Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

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HERBERT S. MONCIER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is Petitioner protected from being charged with criminal contempt for conduct he reasonably believed was required by his ethical and Constitutional duties as an attorney-advocate for his Client?

2. Does Petitioner have a right to a jury trial for criminal contempt after repeal of prior "petty offense" classification; re-classification of contempt; and new guideline sentence for contempt provided for in the Ominous Crime Act of 1984 and this Court's opinions in *Jones*, *Apprendi* and *Blakely*?

3. Was Petitioner denied his structural constitutional right to an impartial judge by the Sixth Circuit Opinion denying Petitioner defenses at a new trial based on a record that was created before a district judge that was disqualified?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Sixth Circuit were Petitioner, Herbert S. Moncier and Respondent, the United States of America.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... viii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... ix

JURISDICTION ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR GRANTING THE PETITION ..... 10

I. Petitioner is protected from prosecution for criminal contempt for conduct he reasonably believed was required by his ethical and Constitutional duties as an attorney-advocate for Vassar. ..... 10

The Sixth Circuit Opinion Is In Conflict With This Court's Opinions And Opinions Of Other Circuit Courts Of Appeals ..... 12

Sacher "Protections" ..... 20

Justification ..... 20

Law Enforcement Qualified Immunity ..... 21

Judicial Immunity ..... 23

Prosecutorial Immunity ..... 23

Constitutional And Ethical Duties To Clients Are Often "Obstructive" ..... 23

Conclusion ..... 24

II. Petitioner was denied his Sixth Amendment right to a jury trial ..... 25

Jones, Apprendi and Blakely Require A Jury Trial ..... 25

A Jury Trial Is Required By The Guideline Sentence And Classification Of The Offense Of Criminal Contempt ..... 26

Criminal Contempt Is No Longer A Petty Offense After 1984 ..... 28

§ 401 Criminal Contempt Is A Felony Pursuant To The Sentencing Guidelines ..... 30

Conclusion ..... 31

III. Petitioner was denied his structural constitutional right to an impartial judge by having his defenses at a new trial limited by the Sixth Circuit. ..... 32

CONCLUSION ..... 36

# TABLE OF AUTHORITIES

## Cases

Blakely V. Washington, 542 U.S. 296 (2004) ..... 25, 26, 31

*Bloom v. State of Illinois*, 391 U.S. 194 (1967), ..... 26, 27

*Brogan v. United States*, 522 U.S. 398 (1998) ..... 20, 21

*Brown v. U. S.*, 359 U.S. 41, (1959), rehearing denied 359 U.S. 976 ..... 28

*Chapman v. United States*, 500 U.S. 453 (1991) ..... 22

*Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) ..... 29

*Frisby v. Schultz*, 487 U.S. 474 (1988) ..... 1

*Gray v. Mississippi*, 481 U.S. 648 (1987) ..... 34

*Holloway v. Arkansas*, 435 U.S. 475 (1978) ..... 16, 18

*Imbler v. Pachtman*, 424 U.S. 409 (U.S. 1976) ..... 23

*In re Dellinger*, 502 F.2 813 (7th Cir. 1974) ..... 14

*In re Herbert S. Moncier*, Supreme Court Application 09A583 ..... 11

*In re McConnell*, 370 U.S. 230 (1962) ..... 16, 18, 20, 25

*In re Murchison*, 349 U.S. 133 (1955) ..... 35

*In re Snyder*, 472 U.S. 634 (1985) ..... 19

*Ladner v. United States*, 358 U.S. 169 (1958) ..... 22

*Lewis v. U. S.*, 518 U.S. 322 (1996) ..... 29

*Maness v. Meyers*, 419 U.S. 449 (1975) ..... passim

*Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) ..... 34

*Mickens v. Taylor*, 535 U.S. 162 (2002) ..... 16, 18

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... 24

*Muscarello v. United States*, 524 U.S. 125 (1998) ..... 22

*Nilva v. United States.*, 227 F.2d 74 (C.A.8, 1955) ..... 28

*Offutt v. United States*, 348 U.S. 11 (1954) ..... 34, 35

*Pierson* v. *Ray*, 386 U.S. 547 (1967) ..... 23

*Reno v. Koray*, 515 U.S. 50 (1995) ..... 22

*Sacher v. United States*, 343 U.S. 1 (1952) .. 10, 16, 20, 25

*Staples v. United States*, 511 U.S. 600 (1994) ..... 22

*Taylor v. Hayes*, 418 U.S. 488 (1974) ..... 16, 18, 27

Tumey v. Ohio, 273 U.S. 510 (1927) ..... 34

*U.S. v. DiPaolo*, 804 F.2d 225 (C.A.2, 1986) ..... 28

*Ungar v. Sarafite*, 376 U.S. 575 (1964) ..... 35

*United States v. Booker*, 543 U.S. 220 (2005) ..... 31

*United States v. Gonzalez-Lopez*, 548 U.S. 140 (U.S. 2006) ..... 19

*United States v. Green*, S.D.N.Y.1956, 140 F.Supp. 117, affirmed 241 F.2d 631, certiorari granted 77 S.Ct. 1057, 353 U.S. 972, 1 L.Ed.2d 1135, affirmed 78 S.Ct. 632, 356 U.S. 165, 2 L.Ed.2d 672 ..... 28

*United States v. Griffin*, 84 F.3d 820 (7th Cir.1996) ..... 35

*United States v. Papadakis*, 802 F.2d 618 (C.A.2, 1986) ..... 28

*United States v. Price*, 30 Fed. Appx. 333 *10 (6th Cir. 2002) ..... 31

*United States v. Voss*, 82 F.3d 1521 (C.A.10, 1996) ..... 30

*United States v. Wells*, 519 U.S. 482 (1997) ..... 22

**Statutes**

18 U.S.C § 401(3) ..... 9

18 U.S.C. § 1(3) ..... 28

18 U.S.C. § 19 ..... 28, 29

18 U.S.C. § 3517(b)(7) ..... 29

18 U.S.C. § 3553(a) ..... 31

18 U.S.C. § 3559 ..... 28, 29, 31

18 U.S.C. § 3571(b)(6) ..... 28, 29

18 U.S.C. § 3571(b)(6) or (7) ..... 28

28 U.S.C. § 455 ..... 32, 33

Omnibus Crime Act, Public Law 98-472, Title II, § 218(a)(1) October 12, 1984 ..... 28, 30

USSG § 2J.1.2(b)(2) ..... 30

USSG § 2J1.1, Application Note 1 ..... 30

USSG § 2J1.2 ..... 29, 30

**Other Authorities**

2 P. Robinson, Criminal Law Defenses §142(a), p. 121 (1984) ..... 20

Code of Conduct for United Judges ..... 33

*Corpus Juris Secunum*, Crimlaw §56 ..... 20

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 571 F.3d 593 (6th Cir. 2009). (Pet. App. 1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Fifth Amendment, United States Constitution.**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Sixth Amendment, United States Constitution.**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**Fed. R. Crim. P. 42(c)(3).**

Rule 42. Criminal Contempt

(c)(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

**28 U.S.C. § 455**

§ 455. Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
. . .
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

. . .

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

. . .

(e) No justice, judge, or magistrate [magistrate judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

## JURISDICTION

On July 8, 2009, the Court of Appeals issued its decision reversing Petitioner's conviction for criminal contempt and remanding for a retrial. (Pet. Appx. 1)

A petition to rehear was denied on September 24, 2009. (Pet. Appx. 16)

On December 15, 2009 Justice Stevens granted an extension of the time to file a petition for a writ of certiorari to February 21, 2010. (Pet. Appx. 17)

Although there is no final judgment below, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), which provides "cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree*." (emphasis added). *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

## STATEMENT OF THE CASE

The FBI conducted an investigation it called "Rose Thorne" since approximately 2000 in the Greeneville Division of the Eastern District of Tennessee. Petitioner, a criminal defense attorney, had successfully represented a number of defendants at trial in the Greeneville Division, some of who had been indicted out of the "Rose Thorne" investigation.

Petitioner represented Michael Vassar since October 4, 2005. Vassar was charged in two indictments. One count was severed resulting in Vassar facing three separate jury trials before District Judge J. Ronnie Greer. Vassar was acquitted at his first jury trial in February 2006.

Petitioner was retained by a Mike Gunter to represent Gunter at a trial in a separate case. Petitioner was also hired by a Harold Grooms, who had not been charged but was being investigated in "Rose Thorne" but Grooms has not been charged to date.

Before conferring with Gunter or Grooms, Petitioner first conferred with Vassar and assured himself there was no potential of a conflict with Gunter or Grooms. Petitioner then conferred with Gunter and Grooms who also had independent counsel. Petitioner and independent counsel for both Gunter and Grooms determined there was no potential conflict. As a precaution, because the three knew each other and were from the same community, Petitioner obtained written acknowledgments and waivers from all three clients. Gunter and Grooms each continued to have independent counsel to represent them in the event a conflict arose in the future preventing Petitioner from representing them at trial.

In March 2006, Petitioner advised the Court and prosecutors that he represented Gunter and Grooms. *Sua sponte* hearings as to potential conflicts were ordered and held in March and April 2006. Vassar testified under oath and denied any knowledge of criminal activity of Gunter or Grooms. Gunter also testified denying any knowledge of criminal activity of Vassar. The prosecutors provided no information to the Court or to Petitioner of any potential conflict.

The Court determined there was no conflict between Petitioner representing Vassar and Petitioner represented uncharged Grooms. The Court disqualified Petitioner from representing Gunter in a separate case because Gunter was also charged as a co-defendant with Vassar but was represented by separate independent counsel. Petitioner returned Gunter's fee. Gunter was

found not guilty of being in a conspiracy with Vassar. In Gunter's separate trial Gunter was convicted. At no time did Petitioner seek Fed. R. Crim. P. 44(c) joint representation of two defendants in one case.

The prosecutors dismissed the charge against Vassar set for the second jury trial.

In his third jury trial, Vassar was acquitted of conspiracy to distribute over 5 kilograms of cocaine; acquitted of conspiracy to distribute over 500 grams of cocaine; but convicted of conspiracy to distribute less than 500 grams of cocaine and a substantive count of delivery of 6.61 grams of cocaine for $125.00.

A complex sentencing proceeding followed. The Government sought a 27-year sentence relying on trial testimony for acquitted conduct. Petitioner asserted Vassar's guideline sentence was 12 months.

Petitioner filed motions, supported by a transcript of a tape recording, asserting that prosecutors had threatened a witness, Thornton, to testify falsely against Vassar.

Petitioner filed motions for the District Judge to disclose information known to the District Judge but unknown to Vassar from search warrants, filings under seal in Vassar and co-conspirator's cases, and sentencing materials in co-conspirator's cases that were material to disputed sentencing factors in Vassar's case.

Petitioner also filed motions charging misconduct by prosecutors unlawfully manipulating sentence guideline calculations up to 500% lower, before USSG §§ 3E1.1 and 5K1.1 reductions. Petitioner asserted that as a remedy, either the indictment should be dismissed for selective sentencing or that Vassar should be provided

the same percentage reduction pursuant to 18 U.S.C. 3553(a)(6) to avoid unwarranted sentence disparity.

Petitioner subpoenaed witnesses who were in federal custody to the sentencing hearing on November 17, 2006, including Thornton, to support allegations of prosecutorial misconduct. Because Petitioner was required to obtain transport orders for the U.S. Marshall, the prosecutors knew Petitioner had the witnesses present to testify on November 17th.

The day before the sentencing hearing, on November 16th, 2006, the prosecutor faxed a letter to Petitioner. The letter included a statement that the prosecutor's star witness, whom Petitioner had subpoenaed to testify at the November 17th hearing, had admitted to committing perjury at Vassar's trial. [Pet. Appx: ***] The letter also stated that another witness, Shults, had given the prosecutors information that Vassar was badly addicted to drugs which was one of Vassar's defenses at trial and at sentencing.

In addition to the favorable evidence disclosed and for reasons that have to date never been explained, the prosecutor in the November 16th letter asserted that Vassar, two years earlier while in jail in 2005, had made a statement to alleged co-conspirator Thornton that implicated Petitioner's client, Grooms.

Vassar was in federal custody approximately 2 hours away from Petitioner. All telephone calls were monitored. Prior to court on November 17th Petitioner provided Vassar a copy of the prosecutor's letter. Petitioner also provided Vassar a letter that Petitioner intended to request the Court to appoint independent counsel to confer with Vassar about the disclosure and, if the information were true, to consider seeking sentencing benefits available to Vassar by cooperating

against Grooms. Petitioner informed Vassar that Petitioner would not discuss the contents of the letter with Vassar prior to Vassar having independent counsel.

The statement in the November 16th letter was later denied by both Vassar and Thornton. To date, the Government has never provided any documentation that supports the alleged statement that Thornton had provided such information in 2005.

The November 16th letter that brought about Petitioner's actions on November 17th has, to date, never been mentioned in any proceeding against Petitioner, including Petitioner's conviction for contempt in the instant case; Petitioner's subsequent suspension from federal practice for seven (7) years by disciplining District Judge Curtis L. Collier; the Sixth Circuit Opinion denying Petitioner the right to present defenses at his new trial; or the Sixth Circuit Opinion by the same panel affirming that suspension. Nor has any Court addressed the suspicious timing of the prosecutor's letter the day before the sentencing hearing wherein Petitioner was calling Thornton to testify against the prosecutors.

Prior to the sentencing hearing on November 17th, Petitioner notified the Court that he needed to be heard. Petitioner first moved the Court to appoint independent counsel to confer with Vassar about the November 16th disclosure. That request was denied. Petitioner next requested the Court to refer the matter to a judge who would not be sentencing Vassar to confer with Vassar about the new disclosure. That motion was denied.

The prosecutor announced he was not interested in Vassar's cooperation against Grooms, raising

additional concerns as to why the prosecutor placed the statement about Grooms in the November 16th letter.

Petitioner and Vassar had planned the sentencing hearing prior to the November 16th letter. Petitioner had Thornton present under subpoena to testify about threats the prosecutor had made to him. Petitioner, however, did not know what Thornton would say about the alleged 2005 statement the prosecutor attributed to Thornton in the November 16th letter.

During a recess shortly before lunch, as Vassar was being taken from the defense table to the lockup, Vassar told Petitioner he wanted Petitioner to go forward with the sentencing hearing. After the recess, Petitioner informed the Court that Petitioner would confer with Vassar over the lunch break and be ready to proceed to the sentencing hearing after lunch.

The Court called Vassar and Petitioner to the podium. At that time Vassar had no advice concerning the risk facing him if he proceeded to the sentencing hearing as planned prior to the November 16th letter. Nor had Vassar received any advice as to the significance or consequences of that information if true. There had been no determination that there was a conflict and the prosecutor had already stated Vassar's cooperation would not be accepted even if the statement were true.

The Court began to present a series of hypothetical questions to Vassar. The Court changed the hypotheticals as the questions proceeded. Vassar was obviously getting confused. Hypotheticals being used by the Court in its questions to Vassar were not factually correct. Petitioner stated objections.

Because Petitioner believed Vassar should have independent counsel, Petitioner had not inquired of

Vassar whether the statement attributed to him in the November 16th letter about Petitioner's other client, Grooms, was true. Depending upon the answer to that question, Vassar faced significant risks from the Court's questioning:

(1) Vassar had previously testified under oath during the March and April 2006 hearing that he did not know of any criminal activity of Grooms. If in response to the Court's questions, Vassar now acknowledged the information in the prosecutor's letter about Grooms was true, Vassar would have incriminated himself for perjury and obstruction of justice; adjustments could be made to his Guideline sentence calculation for obstruction; or, at a minimum, Vassar would have provided evidence against himself that could be weighed against Vassar in 18 U.S.C. §3553(a) sentencing factor determinations.

(2) Petitioner had represented to the Court in March and April 2006 that before agreeing to represent Grooms, Vassar told Petitioner that Vassar had no knowledge about any illegal activity of Grooms. If Vassar's purported communication to Thornton about Grooms was true, Petitioner became a potential witness against Vassar.

(3) The new information, if true, conflicted with the planned sentencing defense on November 17th that Vassar did not have knowledge about others, including Grooms, that prosecutors insisted Vassar must provide to implicate if he was offered cooperation.

(4) If Petitioner proceeded with the sentencing hearing as planned prior to the November 16th letter, before investigating the new allegation and before conferring with Vassar, if Petitioner called Thornton to testify about threats made by the prosecutor, during

cross-examination the prosecutor would ask about the alleged 2005 Vassar communication about Grooms.[1] If Thornton admitted the communication, Vassar would be subject to an increased sentence for obstruction of justice by reason of Vassar's March and April 2006 sworn testimony.

Vassar had received no advice pertaining to questions the Court was propounding or actions the Court could take based on Vassar's answers to questions propounded. Vassar had received no advice that the Court was attempting to obtain a waiver of Vassar's Constitutional right to conflict-free counsel before Petitioner had an opportunity to determine whether the new information was true and whether Petitioner had an actual conflict. Vassar had received no advice that he could request the Court to allow him to confer with and obtain the advice of Petitioner during questions being propounded by the Court.

It was during these exigent circumstances and imminent risks to Vassar, that Petitioner asked "May I speak to my -- [Client]." The colloquy that resulted in Petitioner's conviction for contempt was as follows:

**Mr. Moncier:** Once again your honor --
**The Court:** Mr. Moncier --
**Mr. Moncier:** He makes --
**The Court:** Mr. Moncier, you be quiet.
**Mr. Moncier:** May I approach the bench?
**The Court:** You may stand there and do what I told you to do until Mr. Vassar answers this question.
**Mr. Moncier:** For the record, your Honor, I object with him having --

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[1] This District Judge generally does not limit cross-examination to the subject of direct.

**The Court**: Mr. Moncier, one more word and you're going to jail.
**Mr. Moncier**: May I speak to my -- [Client][2]
**The Court**: Officers, take him into custody. We'll be in recess.
[12:47 p.m.]

[Pet. Appx. 68-69]

Petitioner was placed in jail; disqualified from representing Vassar; and cited by the Court for criminal contempt. [Pet. Appx. pp. 23-36]

While the contempt citation against Petitioner was pending the Court appointed Vassar new counsel. At a hearing with Vassar and his new counsel on January 29, 2007, the Court reinstated Petitioner as Vassar's attorney and Petitioner represented Vassar at sentencing hearing on February 12, 2007.

On May 30, 2007 the Court found Petitioner guilty of criminal contempt of court under 18 U.S.C. § 401(1) and 401(3) for violating his directive "Mr. Moncier, one more word and you're going to jail."

On August 27, 2007 the Court sentenced Petitioner to one-year probation; a fine of $5,000.00; 150 hours of community service; 3 extra hours of ethics CLE; and completion of an anger management course. [Pet. Appx. 18-28]

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2 The typed transcript does not contain [Client] after "--". Petitioner added [Client] in brackets because that is what Petitioner was attempting to say. The court reporter did not either hear Petitioner say "Client" or Judge Greer spoke over Petitioner. Judge Greer had already prohibited Petitioner from speaking to the Court. Petitioner's use of the possessive pronoun "my" could only relate to "Client."

Petitioner moved to stay the sentence. The Court denied a stay except to permit Petitioner to deposit the $5,000.00 fine with the Clerk pending appeal.

The Sixth Circuit held that Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(a)(3), reversed Petitioner's conviction and remanded for a new trial. [Pet. App. Opinion p. 9, part B]

The Sixth Circuit limited Petitioner from asserting any issue raised on appeal at his new trial based on the record from the contempt trial for which Judge Greer was disqualified. [Pet. Appx. p. 15]

## REASONS FOR GRANTING THE PETITION

### I. Petitioner is protected from prosecution for criminal contempt for conduct he reasonably believed was required by his ethical and Constitutional duties as an attorney-advocate for Vassar.

In *Sacher v. United States,* 343 U.S. 1, 14 (1952), this Court held:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

At Petitioner's sentencing on August 27, 2007 Judge Greer began by stating:

> The Court: A simple statement, Judge, I made a mistake, I'm sorry, would have ended this matter a long time ago, but for some reason, Mr.

> Moncier, you're not able to say those words. You're not able to say, I made a mistake.[3]

The "mistake" Judge Greer said Petitioner made was Petitioner requesting permission from Judge Greer "May I speak to my client?" after Petitioner had been instructed not to approach the bench to argue objections and not to state any further objections as Judge Greer was requiring Petitioner's client to answer questions about a subject the client had previously been questioned by Judge Greer under oath.

Almost 300 pages have now been written about Petitioner's "mistake." Petitioner was convicted of contempt of Court and was stripped of 70% of his law practice that was in federal courts for his "mistake."[4]

No court to date, however, including the Judge Greer; the Magistrate-Judge conducting Petitioner's disciplinary hearing; the District Judge suspending Petitioner from federal practice for seven years; or the Sixth Circuit panel in two opinions, has addressed

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[3] Judge Greer had apparently forgotten Petitioner, before was returned to the Courtroom from jail on November 17, 2006, instructed an attorney appearing for him to apologize to the Court and that attorney told Judge Greer "Mr. Rogers: Before I go on, Your Honor, though I want to make it clear to you that Moncier has expressed to me in the brief time that I spent with him the fact that he was only trying to make an objection; that he intended no disrespect to the court at that time and that he is very sorry that by, by, by attempting to utter his statement that he violated this Court's order when he felt he was compelled to do so."

[4] Petitioner has filed a Petition for Certiorari from his discipline for his conduct before Judge Greer on November 17th in *In re Herbert S. Moncier*, Supreme Court _____ Application 09A583. In that Petition, Petitioner presents this issue in the context of whether Petitioner can be disciplined for conduct reasonably believed to be required by his ethical and Constitutional duties to Vassar.

Petitioner's assertion that his request was not a "mistake" but was reasonably necessary to provide Vassar's Sixth Amendment right to counsel and perform Petitioner's ethical duties to Vassar.

Whether Petitioner made a "mistake" by making the decision to request permission to speak to his client under adverse circumstances in a serious criminal case within a split second as his client was being questioned by the judge goes to the core of what this Court described in *Sacher* as "fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever." *Sacher*, 343 U.S. at 14.

*The Sixth Circuit Opinion Is In Conflict With This Court's Opinions And Opinions Of Other Circuit Courts Of Appeals*

In *Maness v. Meyers*, 419 U.S. 449 (1975), an attorney had advised his client to disobey an order of a judge to produce documents the attorney believed were protected by the Client's Fifth Amendment privilege. This Court first discussed the general rule that an attorney does not have the right to disobey a court order. This Court then established an exception to the general rule that is applicable to Petitioner's actions in this case.

> Thus the issue is whether in a civil proceeding a lawyer may be held in contempt for counseling a witness in good faith to refuse to produce court-ordered materials on the ground that the materials may tend to incriminate the witness in another proceeding. We hold that on this record petitioner may not be penalized even though his advice caused the witness to disobey the court's order.

> The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, could be penalized for advising his client in good faith to assert it. The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence. *id.*
>
> . . .
>
> We are satisfied that petitioner properly performed his duties as an advocate here, and he cannot suffer any penalty for performing such duties in good faith. *id. 557*

In this case the Judge was questioning Petitioner's client just prior to his sentencing hearing. Petitioner requested to approach the bench to argue objections so as to not be accused of "coaching" his client. Petitioner was instructed to "stand there and do what I told you to do until Mr. Vassar answers this question." Petitioner then, from the podium, attempted to state an objection and was instructed "Mr. Moncier, one more word and you're gong to jail." Being unable to state or argue objections, Petitioner requested "May I speak to my client?"

The Sixth Circuit Opinion failed to address, cite or apply this Court's opinion in *Maness*. Instead, the Sixth Circuit Opinion strictly applied the general rule that an order cannot be disobeyed without risk of contempt. According to the Sixth Circuit:

> Mr. Moncier's contention, specifically, is that his "duty to confer and advise Vassar necessarily included potential obstruction of Judge Greer questioning Vassar in the presence of the prosecutor and FBI[.]" *Moncier br.* at 5. The Tennessee Association of Criminal Defense Lawyers make much the same contention in its *amicus* brief supporting Mr. Moncier. The idea appears to be that, had Mr. Moncier not thrown himself across the tracks on November 17, Mr. Vassar's constitutional rights would have been violated. And thus, we are told, it was appropriate, and event necessary for Mr. Moncier, rather than Judge Greer, to take control of the courtroom.
>
> To all of which there is a simple answer: There is no right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. "Lawyers are required to obey even incorrect orders; the remedy is on appeal." *In re Dellinger*, 502 F.2 813, 816 (7th Cir. 1974). We entirely agree with Judge Greer that "someone must be in control of, what happens in a courtroom," and that the someone is "the trial judge, not the lawyer for a criminal

> defendant nor the lawyer for the United States."

Petitioner urges this Court to hold that under the exigent circumstances in this case, Petitioner's simple request for permission of a judge to speak to his client cannot fairly be characterized as throwing "himself across the tracks." Nor does Petitioner's request equate to his taking "control of the courtroom" or participating in a "revolution."

The Sixth Circuit Opinion conflicts with the standard of the Seventh Circuit for holding an attorney-advocate in contempt.

> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.

*In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972)(emphasis added).

Requesting permission to perform a constitutional or ethical duty to confer with and advise a defendant in a serious criminal proceeding, in the heat of a controversy, can hardly be considered "exceeding the outermost limits of his proper role and hindering rather

than facilitating the search for truth." *Dillinger*, 461 at 400.

In *Sacher v. United States*, 343 U.S. 1, 14 (1952), this Court held:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

In *In re McConnell*, 370 U.S. 230, 239 (1962) this Court held:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

Petitioner had a duty to confer and advise Vassar as to the consequences of his answers to the Court's questions; to assert a Fifth Amendment privilege if necessary; and to object to an unresolved potential conflict of interest to preserve that issue for appellate review. *see Mickens v. Taylor*, 535 U.S. 162, 168 (2002) and *Holloway v. Arkansas*, 435 U.S. 475 (1978).

Eastern District of Tennessee Local Rule 83.6 required Petitioner to comply with Tennessee Rules of Professional Conduct in representing Vassar. Petitioner's duties to Vassar regarding the Court's questions are set out in EDTN 83.6, RPC Preface, 1.1, 1.2(d), 1.3, 1.4, 1.14, 1.16, 2.1, 3.1, 3.3, 3.4, and 3.5.

Copies and a truncated statement of these rules is contained in the Appendix.

One of Petitioner's duties was to confer and advise Vassar. Tenn. Sup. Ct. Rule 8, RPC 1.4(b); 2.1. This duty became particularly important in Vassar's proceeding where the Court was questioning Vassar on matters he had previously testified to under oath; in the presence of prosecutors, FBI agents and presentence officers; and immediately prior to deciding on a sentence for Vassar.

The District Judge described his statement to Petitioner "Mr. Moncier one more word and you're going to jail" as "a direct, unequivocal command for silence." [R.44:M&O,J.A.209] It is undisputed that Petitioner was requesting to speak to Vassar when Petitioner spoke the words "May I speak to my -- [Client]." There is no suggestion that Petitioner uttered the words in a loud tone or sarcastic manner.

Petitioner was charged with contempt for uttering words, not for the content, manner or purpose of the words uttered. Curiously, Judge Greer in his Order convicting Petitioner recognized Vassar's right to confer with, and have Petitioner's advice.

> Such a request [by Vassar to speak to Petitioner] would likely have been granted and would not have violated the Court's command to Moncier for silence. [Pet. App. Order pp. ***]

Petitioner's crime was requesting permission to provide Vassar the constitutional and ethical rights Judge Greer would have granted Vassar had Vassar made the request himself. Vassar's right to request to speak to Petitioner, and Petitioner's duty to confer and

advise Vassar, are indistinguishable. Neither is superior to the other.

The Court apparently believed Petitioner's duty to confer and advise Vassar was only triggered upon Vassar's request. *compare* Tenn. Sup. Ct. Rules, RPC 2.1(duty to advise the client if the client's course of action is related to the representation when doing so appears to be in the client's interest); Fed.R.Crim.P. 51(b) duty to object; Fed.R.App.P. 36(a) failure to object; *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Vonner*, 516 F.3d 382 (6th.Cir.2008).

Federal dockets are filled with defendants asserting they were denied the effective assistance of their counsel. Ironically, Petitioner is charged with criminal contempt for attempting to provide his client more assistance of counsel than the District Judge believed Vassar was due.

The Sixth Circuit Opinion also failed to consider the "actual obstruction" requirement of this court established *In re McConnell.* There was no jury present. The Court could have responded to Petitioner's request with a simple "yes" or "no" with far less disruption of the proceedings than occurred as the result of the contempt.

Vassar was traveling on a slippery slope when being required to answer the Judge's questions where his attorney could not object, argue or advise Vassar. *Maness* requires that before Petitioner can be charged with contempt, it must be determined that Petitioner was not performing a duty he reasonably believed was owed to Vassar.

The Court began Petitioner's sentencing hearing by stating "A simple statement, Judge, I made a

mistake, I'm sorry, would have ended this matter."[5] [Pet Appx. pp. 63-66]. Regardless of the fact that Petitioner did apologize to Judge Greer, an attorney's failure to apologize to a court is insufficient to constitute or form the basis for contemp. *In re Snyder*, 472 U.S. 634 (1985)

Under the restrictions the District Judge imposed, Petitioner being present served only to provide an illusory appearance of Vassar having counsel while being questioned. If Petitioner could not object and could not confer or advise Vassar until Vassar answered the Court's questions, there was no reason for Petitioner to be present. The Court's directives was the equivalent of ordering Petitioner removed from the Courtroom or the District Judge continuing his questions of Vassar after Petitioner was placed in jail.

This Court in *United States v. Gonzalez-Lopez,* 548 U.S. 140 (U.S. 2006), held that the denial of a defendant's counsel of choice constituted a structural defect in the proceeding that was complete upon its occurrence requiring reversal without any requirement of a showing of prejudice.

The District Judge's directives to Petitioner not to approach the bench; not to object; and not confer or advise to Vassar until Vassar answered the Court's questions was the functional equivalent of the denial of counsel and pursuant to *Gonzalez-Lopez* was a completed constitutional structural defect in the proceeding.

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[5] The first thing Petitioner requested his attorney say to Judge Greer upon being returned to the Courtroom on November 17th was that Petitioner was deeply sorry that the Court construed Petitioner's attempts to state objections for Vassar were viewed by the Court as contempt. [App. Trans. pp. *****]

*Sacher "Protections"*

This Court in *Sacher* spoke in terms of "protecting" advocates representing clients in criminal proceedings. The Court, however, did not specify what judicial mechanism would protect the advocate-attorney.

This Court has provided afforded judges "judicial immunity"; prosecutors "prosecutorial immunity"; and law enforcement officers "qualified immunity." Petitioner requests this Court grant the Petition to provide defense attorneys "advocate immunity" to implement the protections this Court required in *Maness, Sacher* and *In re McConnell.* "Advocate immunity" for defense attorneys is consistent with other federal common-law "immunities" afforded other participants in judicial proceedings.

*Justification*

In *Brogan v. United States*, 522 U.S. 398, 405, (1998) this Court quoted with approval from *Corpus Juris Secunum*, Crimlaw §56 that:

> Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. See, e.g., 2 P. Robinson, Criminal Law Defenses §142(a), p. 121 (1984) ("Every American jurisdiction recognizes some form of law enforcement authority justification")[6].

Petitioner had duties imposed on him by the Constitution and ethical rules of the Court. If Petitioner reasonably believed he was performing those duties as

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[6] This compliance with the law "justification" defense is different from the "justification" defense defined in Sixth Circuit Pattern Jury § 6.07.

an advocate for his client at the time Petitioner asked "May I speak to my client" then *Brogan* justified Petitioner making that request. Criminal prohibitions of 18 U.S.C. § 401, just as with a law enforcement officer, do not apply where Petitioner's acts were done in compliance with the duties imposed on Petitioner by the Constitution by EDTN LR 83.6/RPC.[7]

*Law Enforcement Qualified Immunity*

This Court created federal common law "qualified immunity" for law enforcement officers where the actions "do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth,* 472 U.S. 511 (U.S. 1985).

Petitioner asserts that applying the *Mitchell* qualified immunity test, a reasonable criminal defense attorney would not understand that the act of asking to speak to his client was contemptuous. Further, under the *Mitchell* standard, a reasonable criminal defense attorney would not have known that a request for clarification of the Court's directive would constitute a violation of the directive.

Even the Government recognized that Petitioner could lawfully speak after the District Court's directive to "stand there and not say another word until your client answers my question." According to the Government, Petitioner should have said "your Honor, Mr. Vassar is indicating that he wishes to consult with me before he responds." [Gov. 6th Cir. Response Brief, p. 39]. A reasonable criminal defense attorney would discern no meaningful difference between that

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[7] Defenses of "coercion" and "necessity" to protect Vassar may also apply.

supposedly lawful request and "May I speak to my client?"

Similarly, Petitioner asserts that Congress did not intend the contempt statute, 18 U.S.C. § 401, to punish effective advocacy. If that intent is unclear, the rule of lenity should be applied.

> The rule of lenity applies only if, "after seizing everything from which aid can be derived," . . . we can make "no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499, 137 L. Ed. 2d 107, 117 S. Ct. 921 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 64, 132 L. Ed. 2d 46, 115 S. Ct. 2021 (1995), *Smith, supra*, at 239, and *Ladner v. United States*, 358 U.S. 169, 178, 3 L. Ed. 2d 199, 79 S. Ct. 209 (1958)). To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute." *Staples v. United States*, 511 U.S. 600, 619, n. 17, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991).

*Muscarello v. United States*, 524 U.S. 125, 138-139 (U.S. 1998).

18 U.S.C. § 401 is ambiguous as to whether Petitioner's attempts to perform constitutional and ethical duties to his client were prohibited. Whether springing from an application of the rule of lenity, qualified immunity or "advocate" immunity, this ambiguity must be resolved in Petitioner's favor.

*Judicial Immunity*

In *Pierson* v. *Ray*, 386 U.S. 547, 554, (1967) this Court held judicial immunity serves the public interest in judges who are "at liberty to exercise their functions with independence and without fear of consequences." The same public interest applies to criminal defense attorneys who are acting to protect the constitutional rights of their clients. *see Maness v. Meyers, supra.*

*Prosecutorial Immunity*

In *Imbler v. Pachtman,* 424 U.S. 409, 422-423 (U.S. 1976), this Court held "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Once again, the same is true of an attorney charged with the constitutional duty to defend a citizen accused of crime.

*Constitutional And Ethical Duties To Clients Are Often "Obstructive"*

Petitioner had a clearly established ethical and constitutional duty to confer and advise Vassar as Vassar was being compelled to answer questions that had serious adverse implications to Vassar.

As discussed *supra*, the Sixth Circuit Opinion belittles the concept that an attorney's ethical or constitutional duty to a client may justify "obstructing" the Court's questioning of Vassar. The Opinion places

the District Judge's directive superior to the constitutional rights of Vassar.

The notion that an attorney can be convicted of contempt for advising a client to disobey an order requiring him to incriminate himself was specifically rejected by this Court in *Maness*. The "obstruction" argument regarding attorneys was also made, and rejected in *Miranda v. Arizona*, 384 U.S. 436, 441 (1966) regarding attorneys advising clients during questioning by police.

> If the individual desires to exercise his privilege, [representation by counsel] he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath-to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

## *Conclusion*

Petitioner suggests that most lawyers and Americans, when informed Petitioner was convicted of criminal contempt for asking a court for permission to "speak to my client" would say "Isn't that what an attorney is supposed to do?"

The Sixth Circuit Opinion is in conflict with this Court's opinions in *Maness*, *Sacher* and *In re McConnell* and the Seventh Circuit Opinion in *In re Dellinger*.

Petitioner requests this Court grant his Petition to consider whether he is immune from being charged with criminal contempt for conduct that was reasonably intended to protect a constitutional right, or to perform an ethical duty, as an advocate for his client in a criminal proceeding.

## II. Petitioner was denied his Sixth Amendment right to a jury trial.

The Sixth Circuit Opinion did not address Petitioner's claim that he was denied his Sixth Amendment right to a jury trial. The Opinion, however, at page 10, in one sentence, simply held Petitioner could not raise claims made on appeal at a new trial and in an all-inclusive ruling held "We have considered all of those arguments [Petitioner's claims on appeal], and with the sole exception of the one made under Rule 42(a)(3) [disqualification of the trial judge], we reject all of them on the merits."

With this ruling, the rule of law in Petitioner's case, although not addressed on appeal, is that Petitioner is not entitled to a jury trial and Petitioner will be denied a jury trial at his new trial. Further, Petitioner may be denied appellate review of any new conviction by a judge at a new trial because the issue was previously "decided" in this appeal.

*Jones, Apprendi and Blakely Require A Jury Trial*

Petitioner asserts the Sixth Circuit Opinion denying a jury trial would be in conflict with this Court's opinions in *Jones v. United States; Apprendi v. United*

*States;* and *Blakely v. Washington.*[8] These decisions of this Court have re-affirmed the Sixth Amendment constitutional right to a jury trial to require any fact necessary for a judge to increase punishment, other than convictions or beyond those facts admitted by the defendant or established by the jury's verdict, be decided by a jury.

The District Judge could not sentence Petitioner for contempt without first making factual findings necessary for the District Judge to convict Petitioner. It is constitutionally illogical to provide Petitioner a right to a jury trial for factual determinations necessary to increase punishment, but deny Petitioner a jury trial for a crime, the conviction of which is required to impose any sentence.

Petitioner requests this Court grant the Petition to hold that the Sixth Circuit's Opinion denying Petitioner a jury trial is in conflict with this Court's opinions in *Jones, Apprendi* and *Blakely.*

*A Jury Trial Is Required By The Guideline Sentence And Classification Of The Offense Of Criminal Contempt*

Petitioner further requests this Court grant the Petition to determine whether prior jurisprudence of this Court pertaining to contempt and petty offense law is no longer applicable to criminal contempt after the Sentencing Guidelines and new classification of offenses.

In *Bloom v. State of Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 1480 (1967), this Supreme Court held:

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[8] *Jones v. United States,* 526 U.S. 227 (1999); *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely V. Washington,* 542 U.S. 296 (2004)

> [S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution. ... [id. 198] Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, are indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases. [Id. 207-08]
> ... deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury. [Id. at 210]...
> If the penalty authorized by the legislature is more than six months, the crime is a serious crime and the defendant is entitled to a jury trial (even though the judge may impose a sentence of less than six months. [Id. at 211]

When *Bloom* was decided a petty offense was defined by 18 U.S.C. § 19 as an offense for which a sentence of less than six months can be imposed. This Court in *Taylor v. Hayes*, 418 U.S. 488 (1974) held a citizen charged with a "petty offense" was not entitled to a jury trial.

*Taylor* is no longer applicable because the punishment for criminal contempt was increased and re-classified by the adoption of Sentencing Guidelines.

*Criminal Contempt Is No Longer A Petty Offense After 1984*

18 U.S.C. § 1(3) defined a "petty offense" as "any misdemeanor that the maximum imprisonment does not exceed 6 months or a fine in excess of $5,000.00." 18 U.S.C. § 1(3) was repealed by the Omnibus Crime Act, Public Law 98-472, Title II, § 218(a)(1) October 12, 1984. The definition of a "petty offense" was replaced by 18 U.S.C. § 19 and 18 U.S.C. § 3559 Classification of Offenses.

Post-1984, 18 U.S.C. § 19 defines a "petty offense" as a Class B or Class C misdemeanor, or infraction, that is punishable by a fine not greater than the amount set forth in 18 U.S.C. § 3571(b)(6) or (7), i.e. $5,000.00. Under the Post-1984 definition of "petty offense", any offense, including criminal contempt, that includes imprisonment for any period is no longer a "petty offense".

18 U.S.C. § 401 criminal contempt has no maximum term of imprisonment or fine. *Brown v. U. S.*, 359 U.S. 41 (1959), rehearing denied 359 U.S. 976. Sentences for criminal contempt of over one year and up to ten years have been upheld as "reasonable." *See United States v. DiPaolo*, 804 F.2d 225 (C.A.2, 1986)(10 years); *U.S. v. Green*, S.D.N.Y.1956, 140 F.Supp. 117, affirmed 241 F.2d 631, certiorari granted 77 S.Ct. 1057, 353 U.S. 972, 1 L.Ed.2d 1135, affirmed 78 S.Ct. 632, 356 U.S. 165, 2 L.Ed.2d 672(3 years)(three years); *U.S. v. Papadakis*, 802 F.2d 618 (C.A.2, 1986)(5 years); *U.S. v. Green*, 630 F.2d 566, (C.A.8 1980) certiorari denied 449 U.S. 904(2 years); *Nilva v. U.S.*, 227 F.2d 74 (C.A.8, 1955)(1 year and a day)

In *Lewis v. United States*, 518 U.S. 322, 326 (1996) this Court held "[T]o determine whether an offense is petty, we consider the maximum penalty attached to the offense."[9] 18 U.S.C. § 401 is not a "petty offense", as defined by 18 U.S.C. § 19, because 18 U.S.C. § 401 does not limit the fine to a maximum of $5,000.00 as required by 18 U.S.C. § 19 and § 3571(b)(6) and (7); 18 U.S.C. § 401 does not define the offense as a Class B or C misdemeanor; and 18 U.S.C. § 401 does not limit the maximum punishment under § 3559(a)(7) to six months or less.

Petitioner acknowledges *Lewis* discussed the pre-1984 case of *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) that permitted the actual sentence imposed to control whether the defendant was entitled to a jury trial when the legislature has not specified a maximum penalty. The *Lewis* Court, however, did not consider Congress' judgment reflected in the 1984 amendments for the definition of a petty offense under 18 U.S.C. § 19; the definition of a felony under § 3559; or USSG § 2J1.2 subjecting obstruction of justice to a 24-30 month sentence.

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[9] The maximum sentence for the offense in *Lewis* was six months making it a Class B misdemeanor. The Court held that even though there were more than one count, the potential of a consecutive sentence did not change the nature of the crime.

*§ 401 Criminal Contempt Is A Felony Pursuant To The Sentencing Guidelines*[10]

The 1984 Ominous Crime Act, *supra*, also established the Sentencing Guidelines. The Sentencing Commission determined, in Application Note 1 to § 2J1.1, that:

> Because misconduct constituting contempt varies significantly ... the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply.

An essential element of 18 U.S.C. § 401 was that Petitioner obstructed the administration of justice. USSG § 2J.1.2(b)(2) "Obstruction of Justice" has a specific offense characteristic that "If the offense resulted in substantial interference with the administration of justice, increase by 3 levels."

In *United States v. Voss*, 82 F.3d 1521 (C.A.10, 1996) the Tenth Circuit held that USSG § 2J1.2(b)(2) "obstruction of justice" was to be applied to criminal

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[10] Petitioner acknowledges the risk of this argument, i.e., Petitioner is tried for a felony at a new trial. Petitioner had practiced law for 37 years without a complaint or discipline. Petitioner has been honored nationally for his trial skills; his mentoring and education of other attorneys; his legal achievements; and his contributions as a criminal defense attorney. Petitioner's law practice since the events of November 17, 2006 has been destroyed. At 63 years of age it is unlikely Petitioner will ever regain what has been lost. Chief Judge Curtis L. Collier has already appointed a new judge from his division of the Eastern District to retry Petitioner. Petitioner would rather face trial for a felony before a jury than be tried again by a Judge who sits in the same district with Judge Greer and on the same bench with Judge Collier.

contempt of court with its Guideline level of 17 and resulting guideline sentence of 24-30 months. *accord United States v. Price*, 30 Fed. Appx. 333 *10 (6th Cir. 2002)

Thus, pursuant to 18 U.S.C. § 3559 (even pre-*Booker*), Congress provided that violations of 18 U.S.C. § 401 were felonies punishable by more that one year with a guideline sentence of 24-30 months. Clearly Petitioner had a Sixth Amendment right to a jury trial for a felony with a guideline sentence of 24-30 months.

Post-*Booker* the question becomes whether sentencing is "reasonable" where Judge Greer ruled pre-trial he will vary 75% below the minimum guideline sentence to a maximum of six months for the purpose of denying Petitioner a jury trial.

No 18 U.S.C. § 3553(a) sentencing factor permits a sentencing Judge to vary below the 24-30 "heartland" guideline sentence before trial for the purpose of denying a defendant a jury trial. There is no procedure in *United States v. Booker*, 543 U.S. 220 (2005) or its progeny for a district judge to determine prior to trial that a "reasonable sentence" for the purpose of denying the defendant a jury trial is six months or less instead of the guideline sentence of 24-30 months.

*Conclusion*

The Petition should be granted for this Court to consider the Sixth Amendment right to a jury trial in the context of this Court's opinions in *Jones, Apprendi* and *Blakely*.

The Petition should also be granted for this Court to review its prior cases in the context of the repeal of prior petty offense definition and the sentence and the

classification of criminal contempt under the Sentencing Guidelines.

## III. Petitioner was denied his structural constitutional right to an impartial judge by having his defenses at a new trial limited by the Sixth Circuit.

Petitioner moved to disqualify Judge Greer from presiding over his criminal contempt trial pursuant to Fed. R. Crim. P. 42(a)(3) and 28 U.S.C. § 455(a), 455(b)(1) and 455(b)(5)(iv).

Petitioner filed numerous statements made by Judge Greer before and after the events of November 17, 2006 but before Petitioner's criminal contempt trial that established Judge Greer harbored a §455(b)(1) bias against Petitioner or, at a minimum, statements that "might reasonably question his impartiality" under §455(a).[11]

The Sixth Circuit Opinion held that Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(a)(3) because Petitioner's conduct "involved disrespect . . . toward the judge."[12] The Sixth Circuit, then, based on the record that had been created before Judge Greer, while he was disqualified, ordered that Petitioner's new trial

> should be unencumbered by any of the arguments in Mr. Moncier's brief to this Court. We have considered all of those arguments, and with the

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[11] Judge Greer said at Petitioner's sentencing that he believed Petitioner's contempt may be his "legacy as a federal judge".

[12] The Sixth Circuit Opinion either failed to address or pretermitted numerous other statements and materials filed by Petitioner pursuant to 28 U.S.C. § 455 to disqualify Judge Greer.

> sole exception of the one made under Rule 42(a)(3), we reject all of them on the merits. [Pet. Appx. Opinion, p. 10]

Judge Greer admitted he believed Petitioner's conduct involved disrespect to him. His own statements established pursuant to Fed. R. Crim. P. 42(a)(3) that he was disqualified.

A fair reading of the Sixth Circuit Opinion appears to express regret by the Court being required to reverse because of the clear provisions Fed. R. Crim. P. 42(a)(3). Respectfully, the Opinion further appears to express excuses for Judge Greer failing to disqualify himself under the rule. In fact, the Sixth Circuit Opinion praised Judge Greer for attempting to "rise above taking personal offense by Mr. Moncier's conduct toward him" and found it was an "ironic consequence that [Petitioner] gets a new trial." [App. Opinion, p. 10]

Respectfully, the Sixth Circuit Opinion treats Fed. R. Crim. P. 42(a)(3) as a technicality. What the Opinion fails to recognize is that Fed. R. Crim. P. 42(a)(3) conduct "involving disrespect to the judge" also requires disqualification pursuant to 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges because the attorney's disrespect might reasonably question the Judge's impartiality. Further, a judge trying a person for actions involving disrespect toward the judge, is disqualifying pursuant to 28 U.S.C. § 455(b)(1) because the allegation of an attorney's disrespect might reasonably call into question whether that judge has a personal bias or prejudice concerning the defendant.

Trial by a judge who is not impartial is not a "technicality" but is a constitutional "structural defect" in the criminal proceeding:

> We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S., at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

*Gray v. Mississippi*, 481 U.S. 648, 668 (1987)

Due process requires recusal of a judge who has become personally embroiled in a controversy and cannot therefore adjudicate it fairly. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-466, (1971).

Likewise, a trial judge should not preside over a criminal contempt proceeding against an attorney where the trial judge has permitted himself to become "personally embroiled" with the defense attorney throughout trial. *Offutt v. United States*, 348 U.S. 11, 17, (1954). As stated in *Offutt* Judges should not sit:

> [I]n judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feelings against the lawyer.. . .The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance.

*Offutt v. United States*, 348 U.S. 11, 17, (1954)

The inquiry is "not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that

the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Ungar v. Sarafite*, 376 U.S. 575 (1964). "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136, (1955). The fact that an appearance of bias is sufficient to warrant disqualification underscores the elemental truth that in a judicial proceeding appearances do matter. *Offutt v. United States*, 348 U.S. 11, 14, (1954).

> The disqualification calculus does not concern what is in the mind of the judge, nor does it prescribe some subjective test by which one might measure the probability of bias or prejudice. Instead, it says that a judge should be disqualified from a proceeding where the circumstances raise reasonable questions about his impartiality, regardless of his state of mind or ability to conduct a fair and impartial hearing.

*United States v. Griffin*, 84 F.3d 820 (7th Cir.1996).

The issue presented is not whether Judge Greer was disqualified. The Sixth Circuit held Judge Greer was disqualified. The issue presented is what effect the Sixth Circuit, or a subsequent judge, can give to the record created before Judge Greer when he was disqualified.

In this case, based on a record created before a disqualified judge, the Sixth Circuit Opinion, without specifically addressing Appellant's claims on appeal, held that Petitioner's retrial "should be unencumbered by any of the arguments in Mr. Moncier's brief to this court. We have considered all of those arguments, and with the sole exception of the one made under Rule

42(a)(3), we reject all of them on the merits." [App. Opinion, p. 10]

To Petitioner's knowledge, This Court has not previously recognized jurisdiction of an Appellate Court to make rulings based on a record created before a disqualified judge.

Petitioner requests this Court to grant the Petition to hold that because there was a constitutional structural defect in the proceedings, the proceedings were void and of no effect and that the legal effect of a proceeding being void is that the proceeding did not occur.

Petitioner further requests this Court grant the Petition to hold that an appellate court, or any subsequent trial court, does not have subject matter jurisdiction to make any rulings based on a void proceeding including those made by the Sixth Circuit denying Petitioner's defenses at a new trial.

## CONCLUSION

For the reasons stated the Petition should be granted.

Respectfully submitted,

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February 22, 2010 *Counsel for Petitioner*

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 07-6053

HERBERT S. MONCIER,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville. No.
07-00040 - J. Ronnie Greer, District Judge.

Argued: March 12, 2009

Decided and Filed: July 8, 2009

Before: DAUGHTREY, ROGERS, and KETHLEDGE,
Circuit Judges

## COUNSEL

**ARGUED:** Ralph E. Harwell, Law Offices of Ralph E. Harwell, Knoxville, Tennessee for Appellant. Robert M. Reeves, ASSISTANT UNITED STATES ATTORNEY, Greeneville, Tennessee for Appellee. **ON BRIEF:** Ralph E. Harwell, LAW OFFICES OF RALPH E. HARWELL, Knoxville, Tennessee, for Appellant. Robert M. Reeves, ASSISTANT UNITED STATES ATTORNEY, Greeneville, Tennessee, for Appellee. Stephen Ross Johnson, Wade V. Davies, RITCHIE, DILLARD & DAVIES, P.C. Knoxville, Tennessee, Caryll

S. Alpert, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Nashville, Tennessee, for Amicus Curiae.

## OPINION

KETHLEDGE, Circuit Judge. Attorney Herbert Moncier appeals his conviction for criminal contempt relating to his conduct during a sentencing hearing before Judge Ronnie Greer. Although we reject all but one of Mr. Moncier's arguments, that one requires us to vacate his conviction and remand for a new trial.

### I.

### A.

This case arises from Mr. Moncier's representation of three potential defendants - Michael Gunter, Michael Vassar, and Harold Grooms - in connection with a federal drug investigation in Tennessee. Gunter and Vassar were tried together in the Eastern District of Tennessee, but Grooms remained unindicted during the time relevant to this appeal. On March 17, 2006, Judge Ronnie Greer conducted a hearing on the question whether Mr. Moncier's representation of Gunter and Vassar presented a conflict of interest for him. That hearing rand more than five hours. During the hearing, Moncier accused the government of "scurrilous" behavior, accused Judge Greer and the assigned Magistrate Judge of bias, and talked over Judge Greer to the point where, for "the first time" since he had "been on the bench[,]" Judge Greer resorted to the gavel to restore order. Judge Greer eventually disqualified Mr. Moncier from his representation of Gunter, finding an unwaivable conflict of interest. Gunter and Vassar were thereafter jointly tried and convicted, with Mr. Moncier representing Vassar.

Mr. Moncier then proceeded to file 43 post-verdict motions on Vassar's behalf. They included: "Motion for Presentence [sic] Hearing Conference to Determine Disputed and Contraverted [sic] Sentencing Issues To [sic] For Which the Court May Be Disqualified From Making Factual Findings[,]" "Motion For An Order To The United States Attorney To Deliver To The Court Documents And Reports Subpoened [sic] For The Sentencing Hearing For the Defense To Inspect To Prepare For The Hearing [,]" " Motion To Sentence Under § 3553 And § 3553(A)(2)[,]" "Motion for Relief from Prosecutorial Sentencing Misconduct, Vindictiveness, Unconstitutional and Selective Guideline Sentence Customs and Practices[,]" and "Third Motion for § 3553(a)(4)/Sentencing Guideline Departure/Variance; Unintended Post - *Booker* Consequences Pre-Mandatory Guideline Repeal of Parole Sentence Alternative[.]" Judge Greer denied virtually all of the motions, which in numerous instances caused Mr. Moncier to file a "renewed" motion of essentially the same substance, which Judge Greer denied.

Judge Greer scheduled Vassar's sentencing hearing for October 28, 2006, which was before the date on which one of Vassar's co-conspirators was scheduled to be sentenced. For tactical reasons, Mr. Moncier wanted the co-conspirator to be sentenced first, and he therefore moved to adjourn Vassar's hearing on October 19 and again on October 26, citing his preference regarding the sentencing sequence and otherwise asserting that he needed more time to prepare for the hearing. Judge Greer denied the motions, but adjourned the hearing anyway, to November 17 - which still came before the co-conspirator's scheduled hearing - because another of his cases had created a conflict for the original hearing date. In the meantime, Mr. Moncier

filed another motion to adjourn, which Judge Greer denied, and then yet another, which Judge Greer did not rule upon because it was filed the night before the hearing.

B.

When Vassar's sentencing hearing began on November 17, Mr. Moncier announced that he had an "emergency matter" to discuss with the court, namely, a potential conflict of interest arising from his simultaneous representation of Vassar and Grooms. When asked to identify the basis for the conflict, Mr. Moncier at first demurred, requesting that "he be permitted to present this to [another] district court judge that will not be making factual findings to my client[.]" Before long, however, Mr. Moncier allowed that the basis was that the government had told him the day before that Grooms had implicated Vassar in certain drug transactions. Mr. Moncier then spoke at considerable length about why he thought an "independent attorney" should be appointed for Vassar to discuss with him whether he wished to retain Mr. Moncier as his lawyer for purposes of his sentencing. Mr. Moncier also suggested that Vassar's sentencing hearing - *i.e.*, the one then underway - be adjourned pending the resolution of the potential conflict.

After taking about a twelve-minute recess to consider the matter, Judge Greer denied Mr. Moncier's various requests. Judge Greer observed that "[t]o the extent, Mr. Moncier, that there is a possibility now that Mr. Vassar knows information about other people who may be clients of yours, you've known about that for months and months and months." Judge Greer also stated that 'I'm simply not willing to postpone this [sentencing hearing] on the basis that there now exists in your mind a conflict that should have been readily

apparent to you six or seven months ago." In response, Mr. Moncier stated that "I must request the court to permit me to withdraw from representing Mr. Vassar because *I cannot effectively advise Mr. Vassar as to how to proceed this morning at the sentencing hearing*[.]" (Emphasis added.)

Mr. Moncier then requested a bench conference out of Vassar's hearing, which Judge Greer reluctantly granted. During the conference Mr. Moncier asserted, among other things, that there was a "precalculated plan of the government . . . to sabotage Mr. Vassar's position" at the hearing; that "they [*i.e.*, the prosecution] don't want people to hire me to try my trials"; that the government was attempting "to attack Herb Moncier"; and that "I'm not going to walk into this trap." When judge Greer asked what he meant by the latter comment, the following exchange occurred:

Moncier: I mean if I have to sit there and remain [mute], I will sit there and remain [mute].

The Court: In other words, you wouldn't provide him a defense?

Moncier: I can't provide him a defense. It would be an ineffective assistance of counsel to do so. Everybody is walking into a 2255 in this situation.

Mr. Moncier then continued:

If my client has known something, as remote as it might be, that pertains to Harold Grooms, that is that Harold Grooms offered to give him some drugs, if he knows that, and if he understands that that is within these tings that the government was wanting, that he need to know that. *He* [i.e., Vassar] *isn't going to tell me if*

*Harold Grooms said that because he knows I represent Harold Grooms.*

(Emphasis added.)

At that point, Judge Greer expressed two concerns. First, he said, "Mr. Moncier, this is, I believe the fifth time in two weeks that you've attempted to get this sentencing hearing continued. What's really going on here? What's going on? To which Mr. Moncier responded: "What's going on here is that I think the government is trying to set me up . . . [B]ecause I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me."

Second, Judge Greer stated that "the one thing that causes me the most concern about this is . . . your statement that because you represent Harold Grooms, your client won't tell you the truth; and if that's the case, I need to do something about that." Mr. Moncier then began to backtrack but Judge Greer reiterated his concern and took a short recess to consider the issue. By that time the hearing had already consumed to and a half hours, all of which had been devoted to Mr. Moncier's potential conflict.

Upon returning, Judge Greer said he had given the conflict issue "a little more thought" and offered to "give each one of you an opportunity to briefly address it further, if you wish to do so." Mr. Moncier took that opportunity, speaking for nearly 15 minutes with little hindrance from Judge Greer. During that statement, Mr. Moncier reiterated his theory that the government had "set this up." But more important was Mr. Moncier's pirouette on the conflict issue; there was, it appears, not a conflict after all. In flat contradiction to

what he had said an hour earlier, Mr. Moncier stated that " I had absolutely and I have today no reason to believe that I have [an] actual conflict of interest between Harold Grooms and Michael Vassar, none, and I don't"; and further that "Mr. Vassar has also instructed me that he wants to go forward with sentencing today." Mr. Moncier then stated, no less than three times, that "Mr. Vassar wants to address the court" regarding his choice of counsel. *Id.*

Judge Greer wanted to speak to Vassar as well. But first he had some words for Mr. Moncier:

> Mr. Moncier, you just made some statements about what you know about this court's attitudes about you and the way you do things. There have been a number of occasions when I have complimented you in the open courtroom on the success you've had in defending criminal defendants in this court. Contrary to what you might see as some disappointment on my part when you get an acquittal, that's not the case. I've never been disappointed or upset when you've gotten an acquittal in this court, nor have I expressed an overall dislike on the way your present your cases.
>
> What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or before a witness; and I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professional who oppose you, nor do I like the aspersions

you cast upon the court at times. You know very well that I did not approve of comments you made about the magistrate judge in this court in the pleadings you filed before this court. I do not like the fact that you'll make an argument before the jury that I sustained an objection to or, or instructed you not to make. That happened in Mr. Vassar's other case where I sustained an objection and you turned around and made the same argument again. That has absolutely nothing - none of that has absolutely anything at all to do with Mike Vassar's sentence out to be in this case.

You think the government is out to get you because you have success. You think the court is against you because you have success. Aside and apart from the egotistical implications that that statement contains, they're [sic] just simply wrong. I don't resent you the success you've had here. Every client - I've bent over backwards in this case from the very beginning to make sure that Mr. Vassar got the counsel of his choice in this case.

* * *

It does, however, bother me in the addition that you've told me in a side-bar conference this morning that if this hearing goes forward today, you intend to sit there at counsel table mute and render ineffective assistance of counsel of Mr. Vassar; and now you tell me that you're prepared to go forward, Mr. Vassar wants to go forward. Those are the kinds of things, Mr. Moncier,

that give me heartburn about your conduct. You' can't have it both ways.

Judge Greer then attempted to speak to Vassar, as Moncier had suggested.

The Court: Mr. Vassar, here's the court's concern. When we have this sentencing hearing I want your lawyer to ask whatever questions are necessary to ask to adequately present your case to this court. I don't want you represented by a lawyer who is reluctant to ask questions for - out of concern about what the answers might be as they relate to Harold Grooms. I don't want your lawyer to be in a position to where he is reluctant to call a witness for fear that the government might ask about Harold Grooms and he doesn't know what the witness is going to say. you understand what I'm saying?

Vassar: Yes, sir.

The Court: I want your lawyer's loyalty to be to you -

Vassar: That' what I want, your Honor.

The Court: -and nobody else.

Vassar: That's what I want.

The Court: Now you understand how those conflicts ca arise in the context of this case with Mr. Moncier representing Harold Grooms and representing you at the same time?

Vassar: I understand.

The Court: Okay. It's a very simple question then, understanding how those conflicts can arise, do you want Mr. Moncier to continue representing you in this case or do you want me to see if I can find somebody who has no connection with any other codefendant or potential codefendant in this case?

Moncier: Once again, you honor -

The Court: Mr. Moncier -

Moncier: He makes-

The Court: Mr. Moncier, you be quiet.

Moncier: May I approach the bench?

The Court: You may stand there and do what I told you to do until Mr. Vassar answers this question.

Moncier: For the record, you Honor, I object without him having-

The Court: Mr. Moncier, one more word and you're going to jail.

Moncier: May I speak to my-

The Court: Officers take him into custody. We'll be in recess.

C.

Judge Greer released Mr. Moncier less than an hour later, and stated that he would not summarily punish Mr. Moncier for criminal contempt under Fed. R. Crim. P. 42(c). Instead, at the request of Mr. Moncier's attorney, Judge Greer directed that the government formally charge Mr. Moncier with two counts of criminal contempt, pursuant to 18 U.S.C. §§ 401(1) and (3). Mr. Moncier thereafter moved to disqualify Judge Greer from the contempt trial, arguing that the charges "involved disrespect toward the court" within the meaning of Rule 42(a)(3). Judge Greer denied the motion.

Judge Greer presided over Mr. Moncier's contempt trial on April 24, 2007. The prosecution introduced the transcript of the November 17, 2006 hearing, and rested. Moncier then testified in his own defense, asserting that his recalcitrance was necessary to protect his client's rights. In a written decision five weeks later, Judge Greer found Moncier guilty of both charges. Judge Greer thereafter sentenced him to one year of probation and a $5,000.00 fine.

The appeal followed.

II.

A.

Mr. Moncier argues that his conviction should be reversed and the charges against him dismissed. Specifically, he argues that the evidence at trial was insufficient to support his conviction. Our review of this issue is limited to whether any rational finder of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The elements of criminal contempt are (1) that the defendant engaged in "misbehavior," (2) that the misbehavior obstructed the administration of justice, (3) that the misbehavior occurred in the presence of the court, and (4) that the defendant acted with "intent to obstruct" *Vaughn v. City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985).

The record permits a finding of these elements here. Mr. Moncier indisputably misbehaved at the November 17, 2006 hearing, and that misbehavior obstructed the court's efforts not only to proceed generally with Mr. Vassar's sentencing, but also specifically to ask Mr. Vassar whether he wished to retain Mr. Moncier as counsel. And there is not doubt that the Mr. Moncier's obstruction was intentional. Mr. Moncier essentially admits as much, but contends he had good reason for the obstruction - namely, as he testified at trial and now argues to this court, that he had an *ethical duty* to obstruct Judge Greer's questioning of his client. The contention is beside the point, however, for purposes of determining whether the record support his conviction. It plainly did.

But the contention warrants comment in its own right. Mr. Moncier's contention, specifically, is that his "duty to confer and advise Vassar *necessarily include[d] potential obstruction of Judge Greer* questioning Vassar in the presence of the prosecution and FBI[.]" *Moncier Br.* at 5 (emphasis added). The Tennessee Association of

Criminal Defense lawyers makes much the same contention in its *amicus* brief supporting Mr. Moncier. The idea appears to be that, had Mr. Moncier not thrown himself across the tracks on November 17, Mr. Vassar's constitutional rights would have been violated. And thus, we are told, it was appropriate, and even necessary, for Moncier, rather than Judge Greer, to take control of the courtroom.

To all of which there is a simple answer: There is not right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. "Lawyers are required to obey even incorrect orders; the remedy is on appeal." *In re Dellinger*, 502 F.2d 813, 816 (7th Cir. 1974). We entirely agree with Judge Greer that "someone must be in control of what happens in a courtroom[,]" and that the someone is "the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States." *May 30, 2007 Opinion and Order* at 23.

We therefore reject Mr. Moncier's arguments for reversal of his conviction and dismissal of the charges against him.

B.

Mr. Moncier next argues that his conviction and sentence should be vacated, and the case remanded for trial before a different district court judge. Mr. Moncier bases this argument on Fed. R. Crim. P. 42(a)(3), which provides that, "[i]f the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or

hearing unless the defendant consents." Here, Mr. Moncier's refusal to allow Judge Greer to question his client was the final event giving rise to the charge of contempt. In a contempt case, however, "the final event in an unfortunate chain of occurrences [cannot] be realistically considered apart from what went before." *United States v. Combs*, 390 F.2d 426, 430 (6th Cir. 1968). We therefore consider whether Mr. Moncier's final recalcitrance was disrespectful towards Judge Greer when viewed in the context of the record as a whole.

Judge Greer himself commented several times on that record. In addressing Mr. Moncier at the close of his contempt trial, Judge Greer stated that "the most bothersome aspect" of the case to him was "the accusations that have been made throughout the course of these proceedings that this court was somehow biased or prejudiced against either you or your client in the Vassar case; and as I indicated in the order [denying the motion to disqualify], those certainly are allegations that could have been found to be personally offensive to this court[.]" Judge Greer also admonished Mr. Moncier, correctly, that "[i]t doesn't make any difference who is sitting up here, the institution, the court, deserves to be treated with respect and decorum."

For two reasons, however, Judge Greer held that the charged contempt did not require his disqualification under Rule 42(a)(3). First, Judge Greer expressed a concern that, if construed to require his disqualification, the rule would "basically allow [] a criminal defendant to pick his or her trial judge" by acting contemptuously towards any judge whom the defendant did not want to preside over his or her case. That would be true, however, only with respect to the contempt charge, not for any underlying (and likely

more serious) charge for which the defendant is prosecuted. And in any event the rule says what it says.

Second, the record makes clear that Judge Greer tried simple to rise above taking personal offense from Mr. Moncier's conduct towards him. In that regard, Judge Greer's finding that Mr. Moncier's conduct was not disrespectful towards him personally, in a manner requiring disqualifications, can be attributed less to an error of judgment, than to an excess of magnanimity. We take a less forgiving view of Mr. Moncier's conduct, and we conclude that, fairly, considered, it did involve disrespect towards Judge Greer within the meaning of the rule, with the ironic consequence that he gets a new trial.

The trial, however, should be unencumbered by any of the arguments in Mr. Moncier's brief to this court. We have considered all of those arguments, and with the sole exception of the one made under Rule 42(a)(3), we reject all of them on the merits.

Mr. Moncier's conviction and sentence are vacated, and the case remanded for trial before a different district court judge.

No. 07-6053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| HERBERT S. MONCIER | ) | |
| | ) | |
| Defendant-Appellant | ) | |

**FILED**
September 24, 2009
LEONARD GREEN, CLERK

**BEFORE:** DAUGHTREY, ROGERS, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

Leonard Green
Clerk

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

December 15, 2009

Mr. Herbert S. Moncier
775 Bank of America Building
550 Main Avenue
Knoxville, TN 37902

Re: Herbert S. Moncier
v. United States
Application No. 09A581

Dear Mr. Moncier:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 15, 2009 extended the time to and including February 21, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter,** Clerk,

by

Ruth Jones
Case Analyst

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 1

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**United States District Court**
**Eastern District of Tennessee**

UNITED STATES OF AMERICA
V.
HERBERT S. MONCIER

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

Case Number: 2:07-CR-40-001

Ralph Harwell & John T. Rogers
Defendant's Attorney

**THE DEFENDANT:**

[ ] pleaded guilty to count(s):___
[ ] pleaded nolo contendere to count(s) __ which was accepted by the court
[x] was found guilty on count(s) One after a plea of not guilty

**ACCORDINGLY,** the court has adjudicated that the defendant is guilty of the following offense(s):

**Title & Section**

18USC 401(1)

**Nature of Offense**

Criminal Contempt

**Date Offense Concluded**

11/17/06

**Count Number(s)**

1

**Title & Section**

18USC 401(3)

**Nature of Offense**

Criminal Contempt

**Date Offense Concluded**

11/17/06

**Count Number(s)**

1

The defendant is sentenced as provided in pages 2 through 5 of this judgment and the Statement of reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

[ ] The defendant has been found not guilty on count(s)__

[ ] Count(s) ____ [] is [] are dismissed on the motion of the United States.

IT IS ORDERED, that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

8/27/07
Date of Imposition of Judgment

Signature of Judicial Officer

J. RONNIE GREER, United States District Judge
Name & Title of Judicial Officer

9/10/07
Date

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 4 - Probation

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Judgment- Page 2 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

**PROBATION**

The defendant is hereby place on probation for a term of 1 year.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any

unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

[x] The above drug testing conditions is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

[ ] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 4A - Probation

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Judgment - Page 3 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

## SPECIAL CONDITIONS OF SUPERVISION

1) You shall attend and complete an anger management class within 6 months.

2) You shall complete a 3 hour course of Ethics and Professionalism which shall be in addition to any other requirement and which shall be completed within 6 months from the date of this order.

3) You shall complete 150 hours of community service work.

4) This shall be a term of supervised probation only to the extent that the special conditions of probation be monitored.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 5 - Criminal Monetary Penalties

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Judgment - Page 4 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

***CRIMINAL MONETARY PENALTIES***

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

Totals:

Assessment
$10.00

Fine
$5,000.00

Restitution
$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee

* Total Amount of Loss

Amount of Restitution Ordered

Priority Order or Percentage of Payment

Totals: $___ $___

[ ] If applicable, restitution amount ordered pursuant to plea agreement $ ___

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1998 and before April 23, 1996.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 6 - Schedule of Payments

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Judgment - Page 5 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

***SCHEDULE OF PAYMENTS***

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [x] Lump sum payment of $5010.00 due immediately, balance due

[ ] not later than__, or
[ ] in accordance with [ ] C, [ ] D, or [ ] E or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in ____ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of __ (e.g.,

months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in ____ (e.g. equal, weekly, monthly, quarterly) installments of $__ over a period of ___ (e.g., months or years), to commence __ (E.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence with O (e.g 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to ***U.S. District Court, 220 W. Depot St., Suite 200, Greeneville, TN 37743.*** Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution; (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

**United States Department of Justice**

United States Attorney
Eastern District of Tennessee

---

Please reply to the Greeneville Office

Headquarters
800 Market Street, Suite 211
Knoxville, Tennessee 37902
423/545-4167
FAX 423/545-4167

1110 Market Street, Suite 301
Chattanooga, Tennessee 37402
423/752-5140
FAX 423/752-5150

202 Sunset Drive, Suite 509
Johnson City, Tennessee 37604
423/282-1889
FAX 423/282-0840

220 West Depot Street, Suite 423
Greeneville Tennessee 37743
423/639-6759
FAX 423/63-6451

November 16, 2006

By facsimile telecopier and e-mail

Herbert S. Moncier, Esq.
550 Main Avenue, Suite 775
Knoxville, Tennessee 37902
Facsimile: (865)546-7746

Re: *United States v. Michael Vassar*
E.D. Tenn. Case No. 2:05-CR-75

Dear Mr. Moncier:

In accordance with the Court's oral order at th close of the hearing on November 15, 2005. I hav reviewed the FBI and TBI investigative files to determir if there is any information for which disclosure may b required under *Brady* or *Giglio* which has not alread been disclosed. A review of the reports revealed th following information concerning Mr. Vassar. None of th information appears to be exculpatory or mitigatin; however, the information is being disclosed in any ever in light of the defense's expansive reading of wha information you consider relevant to a sentencir determination.

> On March 28, 2002, Chris Shults advised agents that Mike Vassar was selling "hydros" (hydrocodone tablets) and cocaine. Shults stated that he believed and most of the transactions took place in Vassar's garage. Shults said he has been in Vassar's garage and in his home. Vassar is well known for "fixing cars." Vassar seems to enjoy having sex with 20 year old girls. Shults advised that Vassar trades cocaine to the girls for sex.
>
> On April 16, 2002, Chris Shults advised agents that Mike Vassar had one-half ounce or more of cocaine stored in the burglar alarm box at Vassar's garage.
>
> On April 25, 2002, Chris Shults advised agents that a man known as "Bledsoe" helped Mike Vassar on weekends at Vassar's garage next to Vassar's house dismantling and reassembling

stolen vehicles. Shults also stated that Vassar was selling cocaine to Darryl Burgin who works at Ray Hawk's auto salvage, H-1 Auto, every Friday. Shults also reported that Vassar had recently told Ray Hawk that Vassar had sold three air bags to an unknown male and that the unknown male had told law enforcement that he had purchased the air bags from Vassar; Vassar was inquiring of Hawk if the air bags could be traced back to any particular vehicle.

*Michael Carl Vassar* Letter to Mr. Moncier
E.D.Tenn 2-05-CR-75
November 16, 2006
Page 3

In October 2002, Chris Shults advised agents that Mike Vassar was purchasing "hydros" (hydrocodone tablets) from a third individual.

On November 4, 2002, Chris Shults advised agents that a third person was supplying Mike Vassar with hydrocodone, and another person was supplying Vassar and Vassar's girlfriend, Marcella Grooms, with hydrocodone.

On December 12, 2002, Chris Shults advised agents that a third person was supplying Mike Vassar with cocaine. The third person told Shults that he did not completely trust Vassar and was only doing smaller deals with him.

On March 18, 2003, Chris Shults advised agents that Pat Taylor was borrowing Mike Vassar's camping trailer and would be using it to go to the races in Bristol, Tennessee, during the weekend of March 21 through 23, 2003.

On November 2, 2004, Chris Shults advised agents that Mike Vassar was "on oxycontin bad."

On August 18, 2005, Chris Shults advised agents that Lynn Phillips had supplied cocaine to Mike Vassar, Shults, Mark Thornton, and to other persons.

On October 12, 2005, Mark Thornton advised agents that Thornton did not complete any drug transactions with Mike Vassar because Thornton feared Vassar had advised law enforcement about Thornton's trip to Myrtle Beach with Roger Gunter in May 2004 which resulted in Gunter's arrest. Thornton also related in the interview that Vassar had told Thornton, while they were both in custody in the Greene County Detention Center, that approximately two weeks before Vassar was arrested on August 10, 2005, Harold Grooms had contacted Vassar and indicated that he, Grooms would help Vassar in any way. Grooms also offered to supply Vassar with needed drugs. However, according to Vassar, he did not complete any drug transactions with Grooms prior to his arrest.

On July 6, 2006, Dewey Lynn Phillips was interviewed at the Washington County Detention Center. During a polygraph examination, Phillips was asked two test questions:

> (A)Concerning the $80,000 found at the traffic stop, was any of it drug money?
> (B)Did you use any drug money to finance any spec homes?

Phillips answered "no" to both questions and the examiner found the responses to the questions were indicative of deception. Phillips was advised of the results and re-interviewed. Phillips told agents that $40,000 of the approximately $80,000 cash seized from him by the Tennessee Highway Patrol in March 2005 was drug money he had received from Chris Shults, Mark Thornton, and Mike Vassar. Phillips admitted that he had previously lied to investigators about the source of the money. Phillips said most of the $40,000 came from Chris Shults with the rest coming from Thornton and Vassar. Phillips claimed that the remainder of the money belonged to Gilda Cuberson.



Sincerely,

JAMES R. DEDRICK
UNITED STATES ATTORNEY

By /s M. Neil Smith
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. 2:05-CR-75 |
| | ) | |
| MICHAEL VASSAR | ) | |
| | ) | |
| In Re: HERBERT S. MONCIER | ) | |

**NOTICE**

It is hereby **ORDERED** that the trial of the criminal contempt charge against Herbert Moncier shall be held at 9:00 a.m. on Tuesday, April 24, 2007 at the James H. Quillen United States Courthouse in Greeneville, Tennessee and that Assistant United States Attorney Robert M. Reeves is appointed, pursuant to the provisions of *Fed. R. Crim. P.* 42(a)(2), as the prosecutor in the case. This will allow the defendant a reasonable time to prepare a defense.

**SPECIFICATION OF THE CHARGE:**

Count 1 - It is charged that Mr. Moncier's conduct in the course of a hearing held on November 17, 2006, in knowing violation of the clear and specific directions from the Court, interrupted the orderly process of the hearing. As set out in the transcript of that hearing, Mr. Moncier's disruptive conduct consisted of the following:

**THE COURT:** MR. VASSAR, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY

TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THE COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR - OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?

**MR. VASSAR:** YES SIR.

**THE COURT:** I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU -

**MR. VASSAR:** THAT'S WHAT I WANT.

**THE COURT:** NOW, YOU UDNERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

**MR. VASSAR:** I UNDERSTAND.

**THE COURT:** OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE RPRESENTING YOU IN THIS CASE OR DO YOU WANT TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

**MR. MONCIER:** ONCE AGAIN, YOUR HONOR -

**THE COURT:** MR. MONCIER -

**MR. MONCIER:** HE MAKES -

**THE COURT:** MR. MONCIER, YOU BE QUIET.

**MR. MONCIER:** MAY I APPROACH THE BENCH?

**THE COURT:** YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

**MR. MONCIER:** FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

**THE COURT:** MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

**MR. MONCIER:** MAY I SPEAK TO MY-

**THE COURT:** OFFICERS TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

(RECESS AT 12.47 P.M.)

**SO ORDERED.**

**ENTER:**

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRCT OF TENNESSEE AT
GREENEVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | NO. 2:07-CR-40 |
| | ) | |
| HERBERT S. MONCIER | ) | |

**MEMORANDUM OPINION AND ORDER**

On August 9, 205, Michael Vassar ("Vassar") was indicted by the federal grand jury on charges of possession of cocaine with intent to distribute, being a felon in possession of ammunition, and distribution of cocaine. [Case No. 2:05-CR-70]. Vassar was indicted on September 13, 2005, on charges of conspiracy to distribute and possess with the intent to distribute five (5) kilograms or more of cocaine and distribution of cocaine. [Case No. 2:05-CV-75]. Vassar was represented at the trial of both cases by attorney Herbert S. Moncier ("Moncier").

This matter is before the Court on the issue of the alleged criminal contempt of Moncier on November 17, 2006, during his representation of Vassar in case No. 2:05-CR-75. The contempt matter was tried before the Court without intervention of a jury on April 24, 2007, and was taken under advisement for the purpose of making written findings of fact and conclusions of law.

## FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2006, Michael Vassar was scheduled to be sentenced by this Court after his conviction by a jury in case No. 2:05-CR-75 of a conspiracy to distribute and to possess with the intent to

distribute cocaine. At the beginning of the hearing, Moncier, after informing chambers of an emergency matter to be taken up, stated that he had been supplied with a letter from the United States on the prior day "purporting to be a Brady disclosure." Representing to the court that the letter raised a possible issue pursuant to Rule 44 (c), Moncier asked "to address the Court with the government present on the record in chambers . . ." [Doc. 680, p.2][1]

After the Court cleared the courtroom of all present except for Moncier and Vassar, the government agent and the Assistant United States Attorneys representing the United States and certain court personnel, Moncier moved for a continuance of the sentencing hearing and that the matter be presented to another district judge and an independent attorney be appointed to advise Vassar concerning the Rule 44 matter. After considerable argument, these requests were denied.

Moncier then made various further attempts to postpone the sentencing hearing, including a motion to withdraw as counsel for Vassar and then to withdraw conditionally. These motions were then essentially withdrawn after Moncier informed the Court that his client wished to go forward with the hearing with Moncier representing him and that Vassar wished to

---

[1] The disclosure involved the statement of an already convicted co-conspirator, whom Moncier had subpoenaed to testify at the sentencing hearing, which suggested that Vassar knew incriminating information about another of Moncier's clients, Harold Grooms, alleged to be an unindicted co-conspirator. Moncier argued that independent counsel should be appointed to advise Vassar concerning the possible conflict of interest on Moncier's part created by his representation of both Vassar and the unindicted co-conspirator. Moncier asserted that Vassar would not be candid with him about the matter because of the joint representation, thus the need for independent counsel.

address the Court. At the end of a lengthy hearing, during the Court's questioning of Vassar, the following occurred:

> **THE COURT:** MR. VASSRA, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THIS COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR - OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?
>
> **MR. VASSAR:** YES, SIR.
>
> **THE COURT:** I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU -
>
> **MR. VASSAR:** THAT'S WHAT I WANT.

**THE COURT:** NOW, YOU UNDERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

**MR. VASSAR:** I UNDERSTAND.

**THE COURT:** OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOW CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO EE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR PTENTIAL CODEFENDANT IN THIS CASE?

**MR. MONCIER:** ONCE AGAIN, YOUR HONOR -

**THE COURT:** MR. MONCIER -

**MR. MONCIER:** HE MAKES-

**THE COURT:** MR. MONCIER, YOU BE QUIET.

**MR. MONCIER:** MAY I APPROACH THE BENCH?

**THE COURT:** YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

**MR. MONCIER:** FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

**THE COURT:** MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

**MR. MONCIER:** MAY I SPEAK TO MY-

**THE COURT:** OFFICERS TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

## APPLICABLE LAW

Federal courts have inherent powers necessary for them to function as an institution. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L.Ed. 2d 27 (1991). "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id.* (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821)).

"Criminal Contempt is a crime in the ordinary sense, *Bloom v. Illinois,* 391 U.S. 194, 201, 88 S. Ct. 1477, 1481, 20 L. Ed. 2d 522 (1968), and must be proven beyond a reasonable doubt. *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 444, 31 S. Ct. 492, 499, 55 L.Ed. 797 (1911). The judicial contempt power,

however, should be exercised with restraint and discretion. *Railroad Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). The traditional power of a court to punish contempt is codified at 18 *U.S.C.* § 401, which provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -
>
> 1. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> 2. Misbehavior of any of its officers in their official transactions;
>
> 3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

In order to support a conviction for criminal contempt under § 401(1), the record must establish, beyond a reasonable doubt, the existence of four (4) elements. First, there must be evidence that the defendant engaged in some conduct that can be considered "misbehavior." *See Vaughn v. City of Flint,* 752 F.2d 1160, 1167 (6th Cir. 1985). Second, that misbehavior must amount to an "obstruction of the administration of justice," *see id.*, an obstruction that "must be . . . actual, not . . .theoretical . . . ." *See id. at 1168 (citing In re McConnell,* 370 U.S. 230, 234, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962)). Third, the contempt must occur in the presence of the judge imposing the

summary determination of criminal guilty.[2] *See id.* at 1167. Finally, the defendant must have formed an actual intent to cause the obstruction of justice. *See id.* Thus, the improper act must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Id.* at 1169 (quoting *TWM Manufacturing Company v. Dura Corp.*, 722 F. 2d 1261, 1272 (6th Cir. 1983)).

Section 401(3), on the other hand, requires proof beyond a reasonable doubt of (1) resistence or disobedience to the court's "writ, process, order, rule or command," and (2) the act of resistence or disobedience must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *In re Chandler*, 906 F. 2d 248, 250 (6th Cir. 1990)(quoting *TMW Manufacturing Company*, 722 F. 2d at 1272). The second requirement may be "inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *U.S. v. Delahanty*, 488 F.2d 396, 398 (6th Cir. 1973).

Section 401(3), in contrast to § 401(1), requires no finding of obstruction of justice. Section 401(1) is predicated on "misbehavior" rather than the violation of an express order. *United States v. Galin*, 222 F. 3d 1123 (9th Cir. 2000). Also, the wisdom, fairness or correctness of a court's order is not at issue. "If a person to whom a court directs an order believes that order is incorrect that remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."

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[2] The record in this case may have provided an adequate basis for summary disposition on November 17 pursuant to Fed. R. Crim. P. 42(b); however, at the request of Moncier's counsel that the Court not do so, the Court chose to proceed after notice to Moncier, the appointment of a prosecutor and a trial after giving Moncier a reasonable time to prepare a defense. Rule 42(a).

*Maness v. Meyers*, 419 U.S. 449, 458, 95 S. Ct. 584, 42 L.Ed. 2d 574 (1975).

**ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Criminal contempt of court is a very serious matter and, when the alleged contempt involves the conduct of an attorney appearing before the court, even more serious. In addition, the decision whether a criminal defense lawyer's actions are contemptuous requires this Court to balance two very important considerations -- the lawyer's duty to represent a criminal defendant vigorously and zealously and the court's duty to administer justice in an orderly and efficient fashion without contumacious interference by a misbehaving attorney. This balancing of policy considerations becomes even more difficult when dealing with a lawyer like Moncier, an attorney who by his own admission "pushes the envelope"[3] and who is described by his own attorney as a lawyer who will pursue every issue "to the line."[4]

Also important to this Court in determining the issues raised by this matter is the context in which the incident of November 17, 2006, occurred. It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an

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[3] The role of a trial attorney representing a criminal defendant is necessarily contentious, made so by the adversary nature of a criminal proceeding. A criminal attorney nevertheless has a duty to conduct himself in a professional and dignified manner.

[4] Presumably the line between zealous advocacy and contemptuous conduct.

isolated one.[5] It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word. In addition, this case must also be considered in the context of Moncier's long experience in the defense of criminal cases in the federal courts. Moncier has practiced law for 38 years and his actions of November 17, 2006, cannot be viewed as the innocent mistake of a young, inexperienced lawyer or as an aberrant act. Although Moncier's actions on November 17 were decided in a "split second", his decisions were made in the context of a long career of trying cases and dealing with judges and courts under circumstances where decisions and judgments often must be made immediately and without the luxury of extensive forethought.

Use of the court's criminal contempt power should be made sparingly and then exercised only with great restraint. This is especially true where the alleged contemnor is an attorney because of the need to balance the competing policy concerned referenced above. The Court has never made a finding of contempt in any case, much less that of an attorney. Dealing with this case is perhaps the most unpleasant duty of the undersigned since assuming the bench; however, this Court has a clear duty to preserve the institutional integrity of the Court and to assure that the Court's duties are carried out through proceedings which are fair and which are conducted with decorum.

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[5] The is not to suggest that a contemnor must engage in repeated contemptuous misbehavior before he may be held in contempt, only that most judges show considerable restraining in dealing with isolated acts of misbehavior. The U.S. Supreme Court expressly rejected a multiple violation requirement in *Pounders v. Watson*, 521 U.S. 982 (1997).

Taking the monumental step of accusing an attorney of criminal contempt is an act of last resort and, in the Court's view, should be used only after all other efforts have been exhausted to assure the offending lawyer's compliance with the applicable rules of professionalism and civility. Those efforts had already been exhausted with Moncier. Throughout the course of Moncier's appearances before this Court, this Court has admonished Moncier for a wide range of misconduct, has lectured him concerning the Court's expectations as to professionalism and civility and has threatened him with a finding of contempt on prior occasions, all to no avail. This case, ultimately speaking, presents a very simple issue of whether the presiding judicial official will control the course of the proceedings in the courtroom or whether contumacious lawyers will be permitted to take control.

**Analysis under Section 401(1)**

As set forth above, four elements must be established beyond a reasonable doubt before the defendant may be convicted of criminal contempt under § 401(1): (1) misbehavior, (2) amounting to an obstruction of justice, (3) in the presence of the court, and (4) with the actual intent to obstruct justice. Each of these elements will be discussed in turn in the context of the evidence in this case.

**Misbehavior**

Almost any inappropriate act or comment by a lawyer in legal proceedings could be deemed "misbehavior" and the appellate courts have never precisely defined what constitutes sufficiently egregious misconduct but rather have focused on a "range of contumacious conduct disruptive of judicial proceedings." *Pounders*, 521 U.S. at 991. Moncier's

conduct in this case, however - *i.e.* repeatedly interrupting the court after a warning not to do so and in disobedience to the court's directive commanding his silence - is a clear case of misbehavior as contemplated by the statue and is well within "the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority" punishable as criminal contempt. *Id.*

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proff in this case.

**Obstruction of Justice**

The United States Supreme Court has stated the question as to this element to be whether the proof establishes that the misbehavior "obstructed the district judge in the performance of judicial duty." *In re McConnell*, 370 U.S. 230, 234, (1962). "Such obstruction necessarily involves an "act that will interrupt the orderly process of the administration of justice, or thwart the judicial process.' *United States v. Warlick*, 742 F. 2d 113, 116 (4th Cir. 1984). Thus, the government must show "that the defendant's acts delayed the proceedings, made more work for the judge, induced error or imposed unnecessary costs on the other parties." *Am. Airlines, Inc. v. Allied Pilots Ass'n.*, 968 F. 2d 523, 532 (5th Cir. 1992). At a minimum, the defendants misconduct must have "had an effect on the proceedings, which presupposes a cause triggered by the attorney's acts." *Id.* (citing *United States v. Oberhellmann*, 946 F. 2d 50, 52 (7th Cir. 1991)) *United States v. Meacham*, 65 Fed. Appx. 529, 535 (6th Cir. 2003)(Daughtrey, J. dissenting).

Although Moncier argues that he lacked the intent to obstruct justice (discussed below), he has not

seriously disputed that his action on November 17, 2006, had a disruptive effect on the proceedings and resulted in a delay of those proceedings. One point raised by Moncier, however, does bear some discussion here. Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. the Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

As the transcript of the November 17, 2006, proceeding reflects, it was Moncier himself who suggested to the Court that there existed "an issue that pertains to Rule 44(c)." [Doc. 688, page 2]. The issue had arisen, according to Moncier, because the United States had provided him, on the day before the sentencing hearing, information relating to a statement made by a co-conspirator attributing to Vassar a potentially incriminating statement about another of Moncier's clients, an unindicted co-conspirator. Moncier then attempted to convince the Court to refer the matter to another district judge fore hearing and have independent counsel appointed to advise Vassar about Moncier's possible conflict of interest. Moncier asserted, during the hearing, that his client, Vassar, wasn't going to tell (Moncier) if he had made the statement because of his representation of the other client. [Doc. 683, page 43].[6] Moncier wanted Vassar to have the benefit of

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[6] This episode illustrates the extent to which Moncier's behavior on November 17 was out of control. After making the statement that "[H]e (Vassar) isn't going to tell me (Moncier) if Harold Grooms said that because he knows I represent Harold Grooms," (Doc. 683, p.43), Moncier was asked by the Court: "Mr.

independent counsel's advice on whether to cooperate with the government concerning the contents of the alleged statement in order to seek a motion for downward departure for his assistance. After the government indicated that it had no interest in debriefing Vassar, the Court denied both requests.

After further attempts to delay the sentencing haring, Moncier informed the Court that Vassar had told him during a recess that Vassar did not want him [Moncier] to be disqualified [Doc. 683, p. 78], that he [Moncier] did not "have a conflict", [*Id*, p. 88] and that Vassar wanted to address the Court. [*Id*. pp. 88, 89][7] Moncier specifically represented that if he could have the lunch hour to work with his client, he would be ready to proceed with the sentencing hearing at 1:30 p.m. The United States announced that it did not oppose the proceeding going forward with Moncier representing Vassar "if Mr. Vassar represents . . . to the Court that he wishes Moncier to continue as his counsel for this sentencing hearing." [*Id*., pp. 93-94]. Just minutes later, the Court asked Vassar to step to the podium and began to question him with regard to whether he wanted Moncier to continue as his attorney. It was shortly after that questioning began that the above exchange too place, leading to this proceeding.

Moncier's insistence that rule 44 did not permit the Court to question Vassar or that he did not know what the Court was doing is patently absurd and simply not credible in view of the events of November 17. Rule

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Moncier, do you know what you just said to me? Moncier's answer was: "No." (Doc. 683, p.44).

[7] Throughout the November 17, hearing, Moncier repeatedly requested the Court to perform an inquiry or to permit Vassar to address the Court, which makes Moncier's assertions that he "had no idea" why the Court was inquiring of Vassar even more baffling.

44 in fact required the Court ("the court must promptly inquire. . .") to question Vassar about the possible conflict of interest called to the attention of the Court by his attorney. The Court would have simply ignored its responsibility to have done otherwise. *See Moss v. United States*, 323 F. 3d 445, 471 (6th Cir. 2003)(". . . a trial court has the duty to inquire adequately into a trial counsel's conflict of interest if it knows or reasonably should know that a particular conflict exists.") Also, in light of Moncier's repeated requests to the Court to question Vassar or to allow Vassar to address the Court, as well as the government's assertion just minutes before that the Court should determine if Vassar wanted Moncier to continue as his attorney, Moncier's assertion that he did not have any idea why Vassar had been called to the podium lack any credibility.

Moncier's claim that he knew Vassar wanted to speak to him is likewise incredible. For one thing, Moncier testified that he made his observation upon Vassar being called to the podium, yet, he made no request to consult with his client during a lengthy exchange between the Court and Vassar (taking up eight pages of transcript (pages 99-106) and including efforts by Moncier to persuade the Court to rephrase its questions), all of which occurred after Vassar was called to the podium. Secondly, Moncier's testimony that it was obvious during the proceeding at the podium that Vassar wanted to talk with him conflicts with both the transcript and with the Court's own observations. At no time during these proceedings did Vassar ever request time to consult with Moncier.[8] During the entire

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[8] Such a request would likely have been granted and would not have violated the Court's command to Moncier for silence. Michael Vassar was not unfamiliar with the court system nor with a Rule 44 inquiry. The inquiry of November 17 was the third Rule 44 inquiry conducted with Vassar due to concern about Moncier's simultaneous representation of Vassar and other clients.

proceeding at the podium, Vassar listened intently to the Court's questions and made direct eye contact with the Court. Vassar never exhibited confusion but rather affirmatively acknowledged the Court's inquiry and his understanding of the inquiry.

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proof in this case.

**In the presence of the Court**

The record establishes clearly that Moncier's misbehavior occurred in the presence of the Court. The Court FINDS, therefore, beyond a reasonable doubt,

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While the right of a criminal defendant to the advice of counsel is well established, Moncier's insistence that he had an unlimited duty and right to speak to is client is misplaced. Moncier's testimony at trial that he was only trying to protect his client's constitutional rights by interrupting the Court's questions and intended to advise his client not to waive any potential conflict of interest by Moncier directly conflicts with Moncier's representation on November 17 hat his client wanted to proceed with the sentencing hearing represented by Mr. Moncier, that he did not want Moncier disqualified and that Moncier would be ready to proceed with the hearing at 1:30 p.m.

Moncier's trial testimony also appears to contradict his pre-trial affidavit where he seems to suggest that his true motivation was that he did not want Vassar to answer the Court's question because "clients in criminal cases should never answer questions prior to being advised as to what questions they are going to be asked and them being advised as to the purpose for the question and whether my client should respond." [Doc. 10-3, para 18]. Moncier cites no authority for such a view of the bounds of proper advocacy. A criminal defense attorney has no absolute right to interrupt proceedings whether conducted by adversary counsel during cross examination or by the court to advise a client how or whether to answer a question.

that this element of the offense has been established by the proof in this case.[9]

**Actual intent to obstruct justice**

The key question in this case is not whether Moncier's misbehavior obstructed justice (it id) but rather whether he acted with the actual intent to obstruct justice. Moncier testified unequivocally that he did not. As stated by the Sixth Circuit, the improper act must be a "deliberate and intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Vaughn*, 752 F.2d at 1169 (quoting *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1272 (6th Cir. 1983)). The Seventh Circuit has stated the standard for judging the minimum requisite intent for criminal contempt:

> The minimum requisite intent is . . . defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful . . . . Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the required intent.

*United States v. Seale*, 461 F.2d 345, 368-69 (7th Cir. 1972).

Moncier's misbehavior in this case was clearly intentional but the question is: Was it done with actual intent to obstruct justice? Determining one's intent is

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[9] This element usually applies in a summary contempt proceeding. See footnote 2 above.

never easy[10] but I find that the record clearly establishes that Moncier acted with the intent to interrupt the orderly process of the administration of justice and to thwart the judicial process. First of all, Moncier is a very experienced criminal defense lawyer, having practiced for 38 years. His actions on November 17, 2006, therefore, cannot be viewed as the antics of or displaced aggressiveness of an amateur lawyer but rather as the calculated and deliberate acts of a wily veteran. He is not a novice at the practice of law and has handled hundreds of civil and criminal cases.[11] Simply put, Moncier's acts can be labeled neither accidental, inadvertent nor negligent.

Secondly, Moncier's own testimony reveals his motivation and his intent. Moncier testified at trial that he "could not, in good conscience, let the Court go forward and take a waiver from a defendant who did not fully understand the issue."[12] This testimony clearly illustrates Moncier's intent to prevent the sentencing hearing of Vassar from going forward on November 17. he had filed repeated motions for a continuance in the two weeks leading up to the hearing and appeared to be determined to prevent the hearing from going forward, and he appeared to be seizing upon whatever course of

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10 "[T]he question of one's intent is not measured by a psychic reading [the defendant's] mind but by the surrounding facts and circumstances." *United States v. Bolden*, 325 F.3d 471, 494 (4th Cir. 2003).

11 Moncier has tried five (5) criminal jury trials before this Court in the last three years.

12 This is not a direct quote but rather a paraphrase of Moncier's testimony at trial.

action occurred to him on November 17 to delay the proceedings.[13]

Thirdly, and arguably most importantly, determinations about a party's intent largely upon an assessment of his credibility and demeanor by the finder of fact. As set forth more fully above, I do not find much of Moncier's testimony credible nor are his explanations convincing.

Moncier's primary defense in this matter is that he was obligated by his duty to Vassar to seek clarification[14] of the Court's directive by asking to speak to his client in order to prevent harm to his client which would have occurred if Vassar had indicated that he wished to continue to have Moncier to represent him in spite of the potential conflict of interest on Moncier's part. In other words, Moncier argues that he was attempting to prevent Vassar from waiving his constitutional right to conflict free counsel.

This is a position adopted and advanced by the Tennessee Association of Criminal Defense Lawyers ("TACDL") as well.[15] TACDL argues that Moncier has

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[13] So strong was Moncier's determination not to go forward with the sentencing hearing on November 17 that he, at one point, "threatened" to stand mute during the sentencing hearing of his client.

[14] Although Moncier characterizes his conduct as an effort at clarification, it cannot reasonably be characterized as much.

[15] TACDL was granted leave to file an *amicus curiae* brief in this case. While the Court welcomes TACDL's view on these issues because of its focus and potentially special insight, the Court was disappointed by the superficial knowledge and treatment of the issue before the Court. First of all, the TACDL brief mistakenly states that Moncier was charged with criminal contempt for requesting permission to speak with his client. That simply is not the case. Secondly, the TACDL motion acknowledges that its brief

both a constitutional and ethical responsibility to interrupt the Court's questioning of Vassar after being instructed not to do so in order to preserve Vassar's constitutional rights, i.e, his Sixth Amendment right to effective and conflict fee counsel. TACDL further argues that to construe Moncier's acts a criminal contempt, "then the court will set a precedent that has a chilling effect on advocacy by the criminal defense bar in general, . . ."

As set forth above, an attorney must generally comply with the order of a court with jurisdiction to make the order, no matter how strong the attorney's disagreement with the order. That the court's order might be incorrect, tyrannical or "just plain idiotic" is no defense in a criminal contempt proceeding alleging disobedience of the order. "Lawyers are required to obey even incorrect order; the remedy is on appeal." *In re Dellinger*, 502 F. 2d 813, 816 (7th Cir. 1974). Trial judges are human and will not always be right. But trial counsel cannot be permitted to flout the rulings of the trial court regardless of how vehemently he disagrees with the ruling. *Comm. of Pa. v. Local Union 542*, 552 F. 2d 498 (3d Cir. 1997). The United States Supreme Court, even while recognizing a narrow

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was based soley on the notice of charges filed by the Court and that TACDL did not view Moncier's conduct in the context of the entire hearing of November 17, 2006.

The TACDL brief was signed by some of the preeminent criminal defense attorneys in Tennessee, several of whom have appeared before this Court. TACDL commendably advocates the fair and effective administration of criminal justice and this Court can only hope that the education and training provided by TACDL to its membership includes the promotion of professionalism and civility in the practice of law - matters which, quite frankly, should be addressed by bar associations and other professional associations of lawyers, not by the courts. This Court would also observe, based upon their conduct when appearing before this Court, that none of the attorneys who signed this brief on behalf of TACDL appear to view zealous advocacy in the same terms as Moncier.

exception to the general rule,[16] has emphasized the "basic proposition that all orders and judgments of courts must be complied with promptly." *Maness*, 419 U.S. at 458.[17]

As for the argument that holding Moncier in contempt would have "a chilling effect on advocacy by the criminal defense bar general", this Court disagrees. As stated by the Court of Appeals for the District of Columbia Circuit:

> "Zealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law."

*In re Ellenbogen*, 72 F. 3d 153 (D.C. Cir. 1995). Flouting a trial judge's commands is the very essence of obstruction of justice. *Local Union 542*, 552 F. 2d at 509.

Prior to assuming the bench, the undersigned regularly represented criminal defendants in both state and federal courts. This Court understands and subscribes to an attorney's duty in trying a case to be zealous and fearless in representing a client's interest. Every defendant is entitled to such advocacy on his behalf. The direct order of a trial judge, however, fixes

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16 An exception which has no application to this case.

17 The narrow exception found by the court in *Maness* dealt with a situation where a defendant was being required to relinquish his Fifth Amendment right against self incrimination, a result for which there was no appropriate remedy on appeal.

the limits of proper advocacy and the vigor permissible in representing a client's interest never includes the flouting of a judge's rulings. *See Dunn v. United States*, 388 F.2d 511, 513 (10th Cir. 1968); *In re Osborne*, 344 F.2d 611, 615 (9th Cir. 1965). Defiance and disobedience should not be confused with zealousness or vigorous advocacy.

Moncier's insistence that his duty to his client required his defiance of the Court is misplaced. If this Court acted arbitrarily in commanding silence from Moncier and failed to grant him reasonably opportunity to argue his position to the detriment of his client, then the court of appeals would have reversed.[18] And even if Moncier subjectively believed that his actions were necessary to preserve issues for appellate review[19] (which he has not claimed) such belief does not excuse direct violation of a direct order of the trial judge. 552 F.2d at 507; *Halliman v. Untied States*, 182 F.2d 880 (9th Cir 1950), *cert. denied* 341 U.S. 952 (1951).

In short, someone must be in control of what happens in a courtroom and maintain proper decorum. That person is the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States.

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[18] Moncier does not attempt to show any irreparable harm to Vassar which might have occurred had he complied with the Court's command for silence. It is only the order which requires "an irrevocable and permanent surrender of a constitutional right" which cannot be enforced by the contempt power. *Maness*, 419 U.S. at 460; *In re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979). Moncier's counsel tacitly acknowledged that Moncier was not attempting to protect Vassar from the irrevocable surrender of a constitutional right.

[19] Moncier had already stated his objection to the Court's procedure. But even if the Court prevent Moncier from adequately stating his objection, it is well established that an appellate court will not find a waiver of the objection under such circumstance.

Otherwise, the courts lose their ability to administer justice in an orderly fashion. "[T]he trial judge must have the authority necessary to insure the orderly and expeditious progress of the proceedings. His directives in the exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos." *United States v. Seale*, 461 F. 2d at 371 (7th Cir. 1971). An attorney who pursues a course that he deems to be in the best interest of his client and deliberately disregards a direct and explicit order of the trial judge offends the dignity and authority of the court and obstructs justice. *Id.* That Moncier might have acted in subjective good faith and without disrespect does not negate his intent. He acted willfully and with full knowledge that the Court would consider his actions contemptuous. He was explicitly told so.

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proof in this case.

Having found all of the elements of the offense of criminal contempt pursuant to 18 U.S.C. § 401(1) to have been established beyond a reasonable doubt, I therefore FIND Herbert S. Moncier GUILTY of criminal contempt.

**Analysis under Section 401(3)**

Although the record establishes Moncier's guilt pursuant to 18 *U.S.C.* § 401(1), the Court will alternatively consider defendant's conduct under § 401(3). As set forth above, § 401(3) requires proof beyond a reasonable doubt of (1) resistance or disobedience to the court's lawful[20] order or command

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20 The order is lawful if made by a court having subject matter jurisdiction over the case and personal jurisdiction over the parties.

and (2) the act of resistance or disobedience was intentional or willful.

**Disobedience to the Court's order or command**

On November 17, 2006, Moncier received a direct, unequivocal command for silence and that he not further interrupt the Court's inquiry. The issue in this case is not whether the order was a proper or correct order. Other judges might well disagree with or find improper the order issued by the Court. Regardless, however, Moncier had the duty to obey the Court's order. *See Maness*, 419 U.S. at 459 (stating that an order by a court with jurisdiction, particularly during trial, "must be complied with promptly and completely" until reversed). He has not seriously contested the lawfulness of the order[21] or his disobedience of it. This element of the offense is established, beyond a reasonable doubt, from the proof in this case.

**Intent**

The crucial question, here, as with Moncier's intent to obstruct justice, is whether he acted willfully and intentionally in violating the Court's order. For may of the same reasons which led the Court to conclude that he acted with the intent to obstruct justice, the Court FINDS beyond a reasonable doubt that Moncier's

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*Maness*, 419 U.S. at 459. As set forth below, Moncier does not contest either subject matter or personal jurisdiction.

21 Although some suggestion was made by Moncier's counsel during the trial that this Court's order was unlawful, counsel acknowledged, in response to the Court's question, that this Court clearly had both subject matter and personal jurisdiction and there is, therefore, no question as to the lawfulness of the Court's order.

violation of the Court's order was willful and intentional.

The Court likewise FINDS, therefore, that Moncier is also GUILTY of criminal contempt in violation of 18 U.S.C. § 401(3).

**CONCLUSION**

This Court heard proof in this case on April 24, 2007 and was prepared to rule at the conclusion of that proof; however, since the case involves such an important issue; the matter was taken under advisement for further careful and extended consideration. After considering the matter carefully and thoughtfully over the ensuing weeks, this Court has come to the regrettable and unfortunate conclusion that the proof establishes that Moncier is guilty beyond a reasonable doubt of criminal contempt under both subsections one and three of 18 *U.S.C.* § 401. The record in this case clearly establishes beyond a reasonable doubt that Moncier disobeyed the clear, unequivocal and lawful order of this Court and that he did so with the intent to obstruct the administration of justice and to interfere with the orderly conduct of this Court's proceedings on November 17, 2006.

While it would have been far easier and less time consuming for this Court to ignore Moncier's contemptuous conduct, to do so would be to encourage disobedience to lawful court orders. The ability of this Court - indeed, all courts - to compel obedience to its orders is fundamental to its proper function. For the Court to turn its head to Moncier's conduct would likewise further erode the respect of the public for the bar, the vast majority of whom take seriously "the process of an orderly trial, which are the supreme object of the lawyer's calling." *Sacher v. United States*, 343

U.S. 1 (1952). The vast majority of lawyers vigorously represent their clients and understand that zealous representation of a criminal defendant does not include deliberate defiance of a judge's direct and explicit orders. Moncier's deliberate and continued interruption and argument with the rulings of the court and his unprofessional and contumacious conduct must cease; otherwise, the Court surrenders control and independence of the proceedings to lawyers who "equate contempt with courage." *Id.* This Court is unwilling to do so.

Sentencing in this matter is set for August 27, 2007, at 9:00 a.m. This matter is referred to the United States Probation Office for the preparation of a presentence report, as requested by the defendant. Sentencing proceedings in this matter will be conducted in accordance with LR 83.9.

The offense is punishable by an appropriate fine or by a term of imprisonment. The sentencing guidelines do not suggest a guideline range for this type of criminal contempt, *see U.S. Sentencing Guidelines Manual* Section 2J1.1 (2006); however, as indicated by this Court's prior rulings in this matter, the Court will consider a term of imprisonment not to exceed six (6) months and will consider all of the factors set forth in 18 U.S.C. § 3553(a) in determining an appropriate sentence in this case. Not later than August 13, 2007, each of the parties shall file with this Court a sentencing memorandum which addresses the relevant factors set forth in 18 U.S.C. § 3553(a) as well as any argument the party wishes to make as to an appropriate sentence. A copy of this sentencing memorandum shall also be supplied to the Probation Officers.

SO ORDERED.

ENTER:

s.J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

UNITED STATES OF AMERICA, .
.
GOVERNMENT .
.
VS. .
.
HERBERT S. MONCIER .
.
DEFENDANT .

DOCKET NO. 2:07-CR-40

GREENEVILLE, TN
AUGUST 27, 2007
9:45 A.M.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE J.
RONNIE GREER UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

U.S. ATTORNEY'S OFFICE
ROBERT M. REEVES, AUSA
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FOR THE DEFENDANT:

JOHN T. ROGERS, ESQ.

ROGERS, LAUGHLIN, NUNNALLY, HOOD & CRUM
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GREENEVILLE, TN 37743

RALPH E. HARWELL, ESQ.
RALPH E. HARWELL P.C.
800 GAY STREET
2131 PLAZA TOWER
KNOXVILLE, TN 37929

COURT REPORTER:

KAREN J. BRADLEY
RPR-RMR
U.S. COURTHOUSE
220 WEST DEPOT STREET
GREENEVILLE, TN 37743

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

PAGE 11

I FULLY UNDERSTAND, AS YOU POINT OUT IN YOUR SENTENCING MEMORANDUM, THAT YOU BELIEVE YOU WERE DOING NOTHING MORE IN THIS CASE THAN REPRESENTING THE INTEREST OF YOUR CLIENT. AND I HIGHLIGHTED WHEN I READ YOUR SENTENCING MEMORANDUM ONE OF THE QUOTES THAT YOU'VE USED BEFORE WITH THIS COURT, AND IT'S A QUOTE DIRECTLY FROM A CASE THAT'S I'VE READ, WHICH SAYS, ATTORNEY HAVE A RIGHT TO BE PERSISTENT, VOCIFEROUS AND IMPOSING, EVEN TO THE POINT OF APPEARING OBNOXIOUS, WHEN ACTING IN THEIR CLIENT'S BEHALF.

I DON'T KNOW WHERE THIS ATTITUDE THAT LAWYER IS JUSTIFIED IN DOING JUST ANYTHING TO REPRESENT THE INTEREST OF HIS CLIENT CAME FROM. I DON'T KNOW WHAT LAW SCHOOL IS TEACHING THAT, BUT THAT IS NOT NOW NOR HAS IT EVER BEEN THE ACCEPTED AND THE PROFESSIONAL WAY OF DOING THINGS IN A COURTROOM.

AS YOU AND I HAVE TALKED BEFORE, THERE ARE BOUNDARIES THAT ARE SET, THERE ARE LINES THAT ARE DRAWN BY THE PERSON WHO IS IN CONTROL OF THE PROCEEDINGS, THAT BEING THE JUDGE. AND WHETHER YOU AGREE OR DISAGREE WITH WHERE THOSE LINES HAVE BEEN SET, REPRESENTATION OF THE INTEREST OF YOUR CLIENT DOES NOT JUSTIFY STEPPING ACROSS THAT LINE OR KICKING SAND IN THE FACE OF THE JUDGE BY BLATANTLY DISOBEYING A DIRECTIVE OF THE COURT.

A SIMPLE STATEMENT, JUDGE I MADE A MISTAKE, I'M



SORRY, WOULD HAVE ENDED THIS MATTER A LONG TIME AGO, BUT FOR SOME REASON, MR. MONCIER, YOU'RE NOT ABLE TO SAY THOSE WORDS. YOU'RE NOT ABLE TO SAY. I MADE A MISTAKE.

I DON'T WANT TO IMPOSE ANY SENTENCE IN THIS CASE. YOUR LAWYER HAS NOW SUGGESTED TO ME THAT PROBATION IS NOT AN OPTION, WHICH LEAVES ME BUT TWO CHOICES, A FINE OR A TERM OF IMPRISONMENT. THE FINE

I'M LIMITED TO IN THIS CASE MEANS NOTHING TO YOU, SO YOUR LAWYER IS BASICALLY TELLING ME TO CHOOSE BETWEEN SENDING YOU TO PRISON OR NOTHING.

WHEN I THINK ABOUT THE REASONS FOR IMPOSING A SENTENCE IN THIS CASE, OR NECESSITY I HAVE TO LOOK TO 3553(A). AND SOME MIGHT ARGUE THAT THIS IS NOT A SERIOUS OFFENSE, A DEFIANCE OF A JUDGE'S ORDER, THE WILLFUL DISOBEDIENCE OF A JUDGE'S ORDER IS NOT A SERIOUS MATTER. WELL, IT'S NOT A VIOLENT CRIME. IT DOESN'T CARRY WITH IT THE POTENTIAL FOR INJURY OR DEATH THAT THE PRIOR CASE DID, FOR INSTANCE. IT'S NOT A DRUG TRAFFICKING OFFENSE. IT DOESN'T CARRY WITH IT THE POTENTIAL OF HARM OR INJURY TO PEOPLE IN SOCIETY THAT THOSE KINDS OF OFFENSES CARRY; BUT IT IS AN OFFENSE, MR.MONCIER, THAT STRIKES AT THE VERY HEART OF OUR SYSTEM OF JUSTICE. IT IS THE KIND OF OFFENSE THAT ADDS TO AN CREATES IN THE FIRST INSTANCE THE PUBLIC'S DISTRUST OF THE LEGAL SYSTEM.

IT'S NOT AN OFFENSE, IN OTHER WORDS, THAT I FEEL

. . . . . .

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

UNITED STATES OF AMERICA, .
.
GOVERNMENT .
.
VS. .
.
MICHAEL VASSAR, .
.
DEFENDANT .

DOCKET NO. CR-2-05-75

GREENEVILLE, TN
NOVEMBER 17, 2006
9:05 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J.
RONNIE GREER UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

U.S. ATTORNEY'S OFFICE

FOR THE DEFENDANT:

HERBERT S. MONCIER, ESQ.

COURT REPORTER:

KAREN BRADLEY

RPR-RMR
U.S. COURTHOUSE
220 WEST DEPOT STREET
GREENEVILLE, TN 37743

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER

PAGE 107

OR DO YOU WANT ME TO SEE IF I CAN FIND SOMBEDOY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR --

THE COURT: MR. MONCIER --

MR. MONCIER: HE MAKES --

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECTION WITHOUT HIM HAVING--

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY --

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

(RECESS AT 12:47 P.M.)

(END OF SEALED PROCEEDINGS)

* * * * * *

**UNITED STATS OF AMERICA, Plaintiff-Appellee v. SHAWTE DEBAR PRICE, Defendant-Appellant.**

**No. 00-2399**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**30 Fed.Appx. 333; 2002 U.S. App. LEXIS 1065**

**January 23, 2002, Filed**

**PRIOR HISTORY:** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. 00-00057. McKeague. 11-14-00.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Brian K. Delaney, Office of the U.S. Attorney for the Western District of Michigan, Grand Rapids, MI.

For SHAWTE DABAR PRICE, Defendant - Appellant: Richard E. Zambon, Mitchell & Zambon, Grand Rapids, MI.

**JUDGES:** BEFORE JONES and COLE, Circuit Judges; SARGUS, District Judge.* *The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

**OPINION BY:** R. GUY COLE, JR.

**OPINION**

**R. GUY COLE, Jr., Circuit Judge.** This is an appeal from sentence in a contempt of court action. Defendant-Appellant Shawte Debar Price pleaded guilty to contempt of court, a violation of 18 U.S.C. § 401, [**2] for failing to obey a direct order to testify at the trial of Quincy Price, Defendant's brother. Because we agree with the district court that the obstruction of justice provision of § 2J1.2 of the U.S. SENTENCING GUIDELINES MANUAL (2000) is the most analogous to the facts in this case, we **AFFIRM** the judgment of the district court.

## BACKGROUND

On May 11, 2000, a grand jury for the Western District of Michigan, Southern Division, returned a two-count superseding indictment naming Price as the sole defendant for being in contempt of court.

Previously, on December 4, 1997, Defendant and his brother, among others, were indicted for conspiracy to unlawfully distribute and possess with intent to distribute cocaine, cocaine base, and marijuana contrary to 21 U.S.C. § 841(a)(1). Defendant pleaded guilty pursuant to a plea [*334] agreement in which he agreed to cooperate with the prosecution and testify against other members of the conspiracy. Defendant received a three-level reduction in consideration for this agreement. Defendant ultimately testified before the grand jury.

Anticipating the need for Defendant to testify at the trial of his brother, the Government [**3] applied to the trial judge for an order requiring Defendant's testimony. On September 21, 1999, Judge McKeague signed the order, pursuant to 18 U.S.C. § 6002, directing Defendant to provide testimony at trial.

On January 6, 2000, the trial of Quincy Price commenced before Judge McKeague. On January 7, 2000, the Government called Defendant as a witness to provide testimony against his brother. Defendant answered preliminary questions, revealed to the jury that he had testified before the grand jury, identified his brother for the record, and acknowledges his guilty plea and current service in prison for cocaine distribution. However, Defendant refused to answer questions relating to his own or Quincy Price's involvement in illegal drug activity. Defendant asserted his Fifth Amendment privilege against self-incrimination as his reason for refusing to testify.

On January 11, 2000, the Government recalled Defendant to testify at the trial of Quincy Price and he again refused to answer any questions. Upon his continued refusal to answer questions, the court advised Defendant that his Fifth Amendment privilege was unavailable as a result of his immunity pursuant [**4] to 18 U.S.C. § 6002. The court ordered and directed Defendant to answer questions asked by the Government. The court also advised Defendant that his failure to answer questions could result in his prosecution for criminal contempt. Defendant retook the stand and maintained his silence.

The jury convicted Quincy Price of conspiracy to distribute and to posses with intent to distribute cocaine, cocaine base, and marijuana on January 14, 2000.

Thereafter, the grand jury indicted Defendant for contempt of court. On July 31, 2000, Defendant pled guilty to Count 2 of the superseding indictment pursuant to a written plea agreement. The pre-sentence investigator determine obstruction of justice, U.S.S.G. § 2J1.2, was the guideline appropriate for application in

this case. Section 2J1.2(c)(1) of the Guidelines refers the court to U.S.S.G. § 2X3.1 (Accessory After the Fact) if the "offense involved obstructing the investigation or prosecution of a criminal offense." Finding that defendant's failure to testify constituted such an obstruction, the probation officer applied § 2X3.1(a) to give Defendant a base offense level of 30. This was adjusted downward by three [**5] points under § 3E1.1 (Acceptance of Responsibility) for a total base offense level of 27. Accepting the probation officer's report, the district court sentenced Defendant to a hundred-month term.

Defendant objected to the use of § 2J1.2 and asserted that § 2J1.5 (Failure to Appear by Material Witness) was more closely analogous to the crime charged. The district court determined that the obstruction of justice guideline was most appropriate. This appeal follows.

## DISCUSSION

## STANDARD OF REVIEW

We review the district court's legal conclusions regarding the application of the Sentencing Guidelines *de novo*; however, we accept the district court's findings of fact unless they were clearly erroneous. *United States v. Gort-Didonato*, 109 F.3d 318, 320 (6th Cir. 1997).

## SENTENCING GUIDELINE

The district court did not err in applying the Guidelines.

The guideline for contempt, § 2J1.1, directs the court to U.S.S.G. § 2X5.1 which instructs the court to apply the most analogous offense guideline. The district

court concluded that U.S.S.G. § 2J1.2 (Obstruction of Justice) was the most analogous offense guideline. The application notes to § 2J1.1 permit [**6] such a finding, stating that "in certain cases the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply. "U.S.S.G. § 2J1.1, cmt. n.1.

The dispositive question is whether Defendant intended to obstruct justice or simply remain silent. *See United States v. Ortiz*, 84 F.3d 977, 981 (7th Cir. 1996). In order to show intent to obstruct justice, the Government must point to specific acts by the defendant resulting in the obstruction of justice, or otherwise show the defendant's conduct was designed to interfere with the administration of justice. *Id.*

In *Ortiz*, Manuel Hurtado, an immunized co-conspirator of Julio Ortiz, failed to answer fully the questions put to him by the Government, despite orders from the district court. The prosecution urged Hurtado be sentenced under the obstruction of justice provision of § 2J1.2 because he was acting as an accessory after the fact. *Id.* The Seventh Circuit held that Hurtado's refusal to testify at the trial of co-defendant Ortiz was motivated more by an aversion to being known as a "snitch or an informer" than by a desire to aid Ortiz. *Id.* The Title 18, section [**7] 3, of the United States Code defines an accessory after the facts as a person who, "knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment." The court concluded it was impossible for Hurtado to be guilty of this crime, considering he was incarcerated during the period of time in question, and found the failure to appear guideline more appropriate. *Id.* at 982. However, the court finished its analysis by stating, "This is not to say that the failure to appear guideline must be

used by analogy in all cases involving criminal contempt citations stemming from a failure to testify. in some situations, the use of other guidelines--obstruction of justice and accessory after the fact, to name two--might be better fits." *Id.* at 982.

In this case, the Government pointed to enough specific acts to allow the district court to conclude that the defendant intended to obstruct justice by not testifying. Price had previously decided to enter into a plea agreement with the Government in exchange for full cooperation. he had already [**8] supplied critical information before a grand jury during which he indicated his criminal dealings with co-conspirators. he refused to testify after having received considerable benefits, including a three point reduction on his sentence for cooperating with the Government. Furthermore, he refused to testify at trial only after his brother had been apprehended and the brothers had had an opportunity to talk. As the district court remarked:

> This is not the instance of a defendant simply appearing and sitting in the back of the courtroom and then refusing to testify. . . This is a case where, in order to further his own situation, Mr. Shawte Price decided . . . that it was in his best interests to enter into a plea agreement to testify before a grand jury, including testimony unfavorable to his own brother. It appears that only after his brother was arrested, incarcerated, and they had a chance to talk that [*336] he decided that blood was thicker than a plea agreement . . . .

JA at 162.

We agree with the district court. Instead *Ortiz*, we find this case presents itself more like *United States v. Brady*, 168 F.3d 574 (1st Cir. 1999). In *Brady*, the [**9] grand jury summoned an immunized Brady to testify against two other men in a robber and murder case. Brady refused to testify despite an order by the district court and subsequently pleaded guilty to criminal contempt. In the course of sentencing Brady, the judge discovered that Brady had been criminally involved with the other two defendants, and that he had substantial knowledge of their plans. As a result, the court employed the obstruction of justice offense level set forth in the accessory after the fact provision of the Guidelines. The First Circuit affirmed, holding that the district court could have concluded from the facts that Brady's refusal to testify was motivated, not by an abstract desire not to testify, but because he wanted to impede the investigation and protect his co-conspirators. *Id.* at 580. We find the facts in *Brady* more clearly analogous to the case at bar than *Ortiz*.

Other circuits support his reasoning by likewise applying U.S.S.G § 2J1.2 to contempt convictions. *See United States v. Marquardo*, 149 F.3d 36 (1st Cir. 1998) (Section 2J1.2 most analogous offense for criminal offense where defendant refused to testify [**10] before a grand jury); *United States v. Remini*, 967 F.2d 754 (2d Cir. 1992) (Section 2J1.2 most analogous offense for criminal contempt where immunized defendant refused to testify at trial of mob boss; the court rejected defendant's argument for application of § 2J1.5); *United States v. Voss*, 82 F.3d 1521 (10th Cir. 1996) (Section 2J1.2 was the most analogous guideline where the basis of contempt was defendant's violation of court order to produce records before a grand jury; the court rejected the defendant's argument for application of § 2J1.5).

## CONCLUSION

Pet. Appx. 77

For the foregoing reasons, we **AFFIRM** the judgment of the district court.